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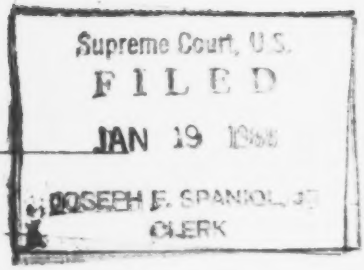

NUMBER OF CASE: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1987

HENRY H. HALE, INDIVIDUALLY AND ON BEHALF OF THE CLASS ALL OTHERS SIMILARLY SITUATED, — PETITIONER

VS.

ANN D. McLAUGHLIN, SECRETARY OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(1) Did the Court of Appeals decide the summary judgment issue in a way in conflict with applicable decisions of this court?

(2) Did the Court of Appeals depart from the accepted and usual course of judicial procedures by permitting the District Court to fail to resolve the untimeliness issue which was clearly a genuine issue in dispute, therefore, prohibiting summary judgment?

(3) Did the Court of Appeals err by sanctioning the District Court in its failure to grant petitioner, a federal employee, a de novo trial which is in conflict with applicable decisions of this court and placed the circuit in conflict with itself?

(4) Did the Court of Appeals err by sanctioning the District Court in its denial to petitioner the rights and procedures common to civil trials such as discovery and the opportunity for settlement?

(5) Did the Court of Appeals err by sanctioning the District Court in its failure to grant or Jeny class certification prior to a determination on the merits?

(6) Did the Court of appeals err by sanctioning the District Court in its holding without a hearing that petitioner's suit was not properly maintainable as a class action and thereby placing it in conflict with applicable decisions of this Court as to call for an exercise of this Court's power of supervision?

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Footnote 1/ Pursuant to Rule 21.1(b) a listing of the parties to the proceeding whose judgment is sought to be reviewed follows: (1) The United States Court of Appeals for the Seventh Circuit, p.302; (2) The United States District Court for the Northern District of Illinois, Eastern Divison, p.175; (3) Equal Employment Opportunity Commission, Milwaukee District Office, p.66; and (4) Ann McLaughlin, Secretary of Labor

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Footnote 2/ Pursuant to Rule 21.1(d) petitioner states that the adverse opinions of the lower courts and the administrative agency is listed in the manner stated in footnote 1 and deals with disparate treatment at every turn whereas petitioner has claimed disparate impact from day one and the opinions should be reversed if there is meaning in stare decisis et non quieta movere.

STATEMENT OF CASE

On January 25, 1979 plaintiff filed an EEO Complaint alleging that the defendant discriminated against him on the basis of his race (Black), when he was not certified for the GS-14 position of Area Director in Charleston, West Virginia on or about October 1, 1978 and that a less qualified white male was selected for the position.

On April 30, 1979 plaintiff filed an EEO Complaint alleging the defendant discriminated against him on the basis of his race (Black), when he was not selected for the GS-14 position of Safety and Program Manager in Atlanta, Georgia on or about January 22, 1979 and that a less qualified white male was selected for the position.

On July 15, 1979 plaintiff filed an EEO Class alleging the defendant discriminated against him on the basis of his race (Black), in professional categories in that defendant had (a) insufficient Blacks in all categories, (b) failed to promote qualified Blacks in all categories, (c) constructively discharged Blacks, (d) failed to hire Blacks, and (e) failed to adequately train Blacks; and that the defendant discriminated against him as an individual when he was not selected for the GS-14 position of Area Director in Niles, Illinois on or about March 9, 1979 and that a less qualified white female was selected for the position. The previous EEO Complaints for Charleston, West Virginia and Atlanta, Georgia were combined with the EEO Class Complaint by

the defendant.

In September 1979 plaintiff filed an EEO Complaint alleging the defendant discriminated against him on the basis of his race (Black), when defendant cancelled a Certificate of Eligibles dated June 6, 1979, listing plaintiff as one of the three certified candidates for the GS-14 positions of Area Director in Cleveland, Ohio and Cincinnati, Ohio; and when he was subsequently not certified for the same position on the new Certificate of Eligibles on or about August 17, 1979, and two less qualified white males were selected for the two positions.

On April 11, 1980 the Equal Employment Opportunity Commission's ("EEOC's") Complaints Examiner issued a Statement of Findings and Recommended

Decision, rejecting plaintiff's class complaint.

On June 18, 1980 the defendant issued its Final Decision where it adopted the EEOC's Statement of Findings and Recommended Decision and rejected plaintiffs class complaint. The letter informed the plaintiff that he could appeal the Agency Final Decision either to the EEOC's Office of Review and Appeals with 20 days of receipt of said decision or to the U.S. District Court within 30 days of receipt of said decision.

On July 14, 1980 plaintiff filed his appeal with the EEOC's Office of Review and Appeals.

On August 28, 1980 plaintiff filed an EEO Complaint alleging that defendant discriminated against him on the basis of

his race (Black), when it failed to certify him for the GS-14 position of Area Director in Columbus, Ohio on or about March 22, 1980, and a less qualified white male was selected for the position. Plaintiff also alleged that defendant retaliated against him for participating in previous EEO activity.

On December 5, 1980 the EEOC's Office of Review and Appeals issued its Final Decision, rejecting plaintiff's appeal as not being filed timely. The Final Decision was addressed to plaintiff at the Agency's office and was not received by plaintiff until December 16, 1980. Plaintiff stated the following in said letter:

> "To prove how silly it was to establish some so-called 'five day presumption', the agency put the wrong zip code on my address. The correct zip code is 60047. The agency used

60041 which delayed the mailing. If the 'silent' aspects of the receipt matter would speak and the agency would locate its return receit, it will be noted that my wife signed for the decision on June 25, 1980..."

"On page 1 of EEOC's decision, it is stated: 'On July 14, 1980, appellant initiated an appeal from the final agency decision...' Yet on page 2 of EEOC's decision it is stated: 'The record indicates, however, that the appellant's appeal was received or filed on July 18, 1980... What kind of game is the Office of Review and Appeals playing? Certainly the Office of Review and Appeals is aware of the entire regulation they published in their decision; whereas, an appeal shall be deemed filed on the date it is postmarked...' See Appendix A for evidence of postmark."

On May 4, 1981 the EEOC denied plaintiff's request to reopen and reconsider the Final Decision of December 5, 1980. The EEOC Commission had forwarded plaintiff's request to their

Office of Review and Appeals, and the same individual who wrote the December 5, 1980 decision also wrote the May 4, 1981 decision.

On April 19, 1982 at a status hearing before Judge McMillan the parties discussed the issue of plaintiff filing his appeal within the 20 day time period before the EEOC's Office of Review and Appeals. Judge McMillan issued a Minute Order remanding the cause of action to the Secretary of Labor. As the transcript of the status hearing indicates, the cause of action was remanded in order to give the plaintiff an opportunity to exhaust his administrative remedies before coming back before this Court for a determination. The Secretary Of Labor in turn was supposed to forward the cause of

action back to the EEOC's Office of Review and Appeals. Plaintiff's cause of action was never forwarded to the EEOC's Office of Review and Appeals pursuant to the court order.

On August 18, 1982 defendant informed plaintiff that his EEO complaints would be processed administratively by the Department of Labor as a class complaint.

On September 13, 1982 the U.S. Attorney's office forwarded a copy of Judge McMillan's Minute Order of April 19, 1982 to the EEOC and indicated that the order only applied to plaintiff as an individual and not as a member of a class.

On October 18, 1982 plaintiff sent a letter to the agency in which he stated that he had given evidence of a July 14,

1982 postmark on his appeal to the EEOC's Office of Review and Appeals. This evidence had been provided to the EEOC Commission on January 22, 1981 in his request for reconsideration of the December 5, 1980 decision by the EEOC's Office of Review and Appeals.

However, on December 1, 1982, the defendant stated that plaintiff's complaints would be processed as individual complaints rather than class complaints by the Department of Labor.

All of plaintiff's complaints were combined in one action on an individual basis before the EEOC in Case Number 051-083-X0123. On January 24, 1984 the EEOC Complaints Examiner ruled that plaintiff's complaints would be processed as individual complaints rather than class complaints.

On April 20, 1984 the EEOC Complaints Examiner reiterated his ruling of January 24, 1984, that the complaints would be processed as individual rather than class complaints; and indicated that plaintiff had elected to proceed to the EEOC Hearing but was reserving the right to state objections to the failure of the Agency or the Examiner to review his allegations of discrimination in the context of a class complaint. The plaintiff agreed to proceed with the EEOC Hearing as individual complaints rather than class complaints in order to avoid further delay and to preserve the record which goes back to 1978.

An EEOC Hearing was held on said individual complaints from September 24, 1984 through September 28, 1984 in Chicago, Illinois.

On April 30, 1985 the EEOC Complaints Examiner issued his Statement of Findings and Recommended Decision in Case Number 051-083-XO123 and he recommended a finding of no discrimination against defendant in all the complaints.

On June 4, 1985, defendant issued its final decision, where it adopted the EEOC's statement of Findings and Recommended Decision and found no discrimination. Defendant informed plaintiff that if he disagreed with the agency's final decision he could file an appeal with the EEOC's Office of Review and Appeals within 20 days of receipt of said decision; or file and action in the U.S. District Court within 30 days of receipt of said decision. The agency's final decision was received by the

plaintiff on June 6, 1985.

On July 8, 1985 plaintiff brought this action as a class action on plaintiff's behalf and on behalf of all Black Professional Workers (GS-5 through GS-15) employed by defendant from March 24, 1972 through the date of this complaint, who have been discriminated against in employment practices, including, but not limited to hire, recruitment, classification, promotion, constructive discharge, training, and awards pursuant to Rule 23(a) and (b)(2).

Petitioner, Henry H. Hale, sued his employer, Occupational Safety and Health Administration, for discriminating against him and others similarly situated, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A #2000e to 2000e-17. He

received judgment from the United States Court of Appeals for the Seventh Circuit on September 24, 1987, and timely petitioned the court on October 8, 1987, for rehearing and suggestion for rehearing en banc. The petition for rehearing was denied on October 20, 1987. He timely filed petition for certiorari with the Clerk of the United States Court of Appeals for the Seventh Circuit on January 19, 1988.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This Court stated in U.S. Postal SVC. BD. of Governors v. Aikens, 31 FEP Cases 611, April 4, 1983, inter alia:

> "All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be

"eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the allocation of burdens and order of presentation of proof.' Burdine, supra, at 252, 25 FEP Cases, at 115. in deciding this ultimate question. The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago: 'The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else.' Eddington v. Fitzmaurice, 29 Ch. Div. 459,483 (1885).

The District Court erroneously thought that respondent was required to submit direct evidence of discriminatory intent, see n.

> 3, supra, and erroneously focused on the question of prima facie case rather than directly on the question of discrimination. Thus we cannot be certain that its findings of fact in favor of the Postal Service were not influenced by its mistaken view of the law."

In addition, this Court stated in Genl. Bldg. Contractors Assn. v. Pennsylvania, 29 FEP Cases 156, June 29, 1982, inter alia:

> "Racial discrimination can be the most virulent of strains that infect a society, and the illness in any society so infected can be quantified. Exposure to embarrassment, humiliation, and the denial of basic respect can and does cause psychological and physiological trauma to its victims. This disease must be recognized and vigorously eliminated wherever it occurs. But racial discrimination takes its most malevolent form when it occurs in employment, for prejudice here not only has an immediate economic effect, it has a fulminating integrant that perpetuates the pestilences of degraded

> housing, unsatisfactory neighborhood amenities, and unequal education."

This Court recognized its role as a court of equity before the passage of Title VII by stating in Louisiana v. United States, 380 U.S. 145 (1965), where Justice Black, speaking for a unanimous Court, stated:

> "We bear in mind that the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 380 U.S. at 154.

THE SUMMARY JUDGMENT ISSUE

The Court of Appeals decision on this issue conflicted with this Court's position on summary judgment to the disadvantage of the petitioner. The appelate court stated in its decision that this Court expressed the proper

standard for granting summary judgment in Celotex Corp v. Catrett, 106 S. Ct. 2548, 2552-53, (1986), and it is the considered opinion of petitioner that the appellate court possibly misread Celotex. Petitioner expressed his thoughts in of his brief before the appellate court and in his petition for rehearing. (See Pages 312 - 326).

The opinion of the Court of Appeals appears to be seriously at odds with another decision of this Court that was decided on the same day as Celotex which was June 25, 1986. The case is Anderson v. Liberty Lobby, Inc., 106 S. Ct 2505. Anderson, states, inter alia:

> "Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact...

More important for present purposes, summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that reasonable jury could return a verdict for the nonmoving party.

Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine whether there is a genuine issue for trial. As Adickes, supra, and Cities Service, supra, indicate, there is no issue for trial unless there is sufficient evidence favoring the

nonmoving party for a jury to return a verdict for that party. Cities Service, 391 U.S., at 288-289, 88S.Ct., at 1592. If the evidence is merely colorable, Dombrowski v. Eastland, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967) (per curiam), or is not significantly probative, Cities Service, supra, lt 290,88 S.Ct., at 1592, summary judgment may be granted.

That this is the proper focus of the inquiry is strongly suggested by the Rule itself. Rule 56(e) provides that, when a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial."

The footnote that followed was very important stating:

"This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery."

This was not the situation in this instant case. While the parties were in a pre-trial mode establishing the ground rules, the Senior (emphasis added) District Judge decided before the case was ripe for decision. Not only was discovery not accomplished by either party, but a final pre-trial order had not been entered.

Anderson continued,"...

> plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. (emphasis added by the writer) We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial...

> because the Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary, we vacate its decision and remand the case for further proceedings consistent with this opinion."

In this instant case, the Court of Appeals was not consistent with previous decisions of the Seventh Circuit on summary judgment; i.e. in Regner v. City of Chicago, 789 F.2d 534 (7th Cir. 1986), 40 FEP Cases 1029-32, stated, inter alia:

> "Summary judgment is only appropriate when there is no material fact in dispute. See Liberles v. County of Cook, 709 F.2d 1122, 1129, 31 FEP Cases 1537 (7th Cir. 1983). In determining whether any material fact remains in dispute, all inferences must be viewed in the light most favorable to the party against whom summary judgment would be granted. See Fitzsimmons v. Best. 528 F.2d 692 (7th Cir. 1976).
>
> Because of the relative ease with which a prima facie case of employment

discrimination may be made and the factual complexities inherent in Title VII litigation, summary judgment although certainly available, is generally not favored in Title VII cases. See Logan v. General Fireproofing, 521 F.2d 881, 883, 3 FEP Cases 854 (4th Cir. 1971) ('Ordinarily, summary disposition of Title VII cases is not favored, especially on the basis of a potentially inadequate factual presention,'); Jones v. Western Geophysical Co., 669 F.2d 280, 283, 29 FEP Cases 1117, (5th Cir. 1982) (summary judgment should be 'used cautiously' in Title VII cases). But cf. Aguilera v. Cook County Police and Correction Merit Board, 760 F.2d 844, 849, 37 FEP Cases 1140 (7th Cir. 1985) (Summary judgment appropriate when plaintiff puts in no evidence to oppose a 'massively supported' motion.).

In reviewing the district court's disposition of the case, then, we must examine the standards for establishing a prima facie case under title VII in light of the facts presented here to see whether summary judgment is appropriate.

Title VII forbids an employer 'to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individuals's race' or to use race 'to limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities.' 42 U.S. C. 2000e-2(a)1(), (2). Plaintiffs may pursue Title VII claims under either disparate treatment or a disparate impact analysis. In general, either theory may be applicable to a particular set of facts. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 33 n.15, 14 FEP Cases 1514 (1977); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 92 FEP Cases 1682 (6th Cir. 1982).

Unlike a plaintiff in a disparate treatment case, a plaintiff in a disparate impact case need not show an intent to discriminate. 'To establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.'

> Dothard v. Rawlinson, 433 U.S. 321, 329, 15 FEP Cases 10 (1977); Liberles v. County of Cook, 709 F.2d at 1132...
>
> In view of the requirements for a prima facie case under Title VII, we believe that the plaintiff met this initial burden. The City may certainly be able to rebut this case but the District Court should have put the onus on it to do so. We think that summary judgment was inappropriate at this time, where, in effect, possible work force segregation is suggested and where potentially invalid promotion criteria were used. We therefore reverse and remand for further proceedings not inconsistent with this opinion."

If the appelate court had applied the same standards to petitioner's case, supra, petitioner would not need a writ of certiorari. Petitioner is unable to understand the inconsistency in the statements of Chief Judge Bauer, panel member, when he states in Stumph v. Thomas E. Skinner, Inc., 38 FEP Cases

1117, inter alia:

> "Summary judgment is proper only when 'there is no genuine issue as to any material fact and ... the moving party is entitled to judgment.' Janowiak v. City of South Bend, 750 F.2d 557, 559, 36 FEP Cases 737 (7th Cir. 1984). In Kephart we noted that summary judgment is improper in a discrimination case where a material issue involves any weighing of conflicting indications of motive and intent. 630 F.2d 1218. Accord White Motor Co. v. United States. 372 U.S. 253, 259 (1963) (summary judgment inappropriate 'where motive and intent play leading roles'); Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180, 185 (8th Cir. 1976) '(s)ummary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles'). (2) We believe that the trial court impermissably weighed conflicting evidence in this case and improperly made findings of fact which were not in the light most favorable to plaintiff."

Where was this thinking when petitioner needed it (Emphasis added)?

In addition, Chief Judge Bauer was a panel member when the seventh circuit stated in Mason v. Continental ILL. Nat. Bank, 704 F.2d 361(1983), inter alia:

> "Of course, to be entitled to summary judgement the defendants had to show that on the basis of the evidence obtained in pretrial discovery there was no reasonable possibility of the plaintiff's proving at trial that the reasons the defendants gave for rejecting her in favor of Miss Yarmolchuk were mere pretexts, the real reason being race; ..."

In this instant case, Chief Judge Bauer knew the lower court ruled before either party had established pre-trial discovery and yet he supported the decision of the District Court. Where is justice and fairness?

Also, the seventh circuit stated in Klein v. Trustees of Indiana Univ, 38 FEP Cases 295, inter alia:

> "Furthermore, this burden of producing evidence sufficient to resist a summary judgment motion is not onerous: 'An aggrieved party ... can survive a motion for summary judgment simply by producing circumstantial evidence from which a trier of fact can reasonably infer that (a discriminatory motivation) was determining factor in the employment decision. Once the plaintiff presents the court with some evidence that his employer harbored the prohibited motive, summary judgement for the defendant is inappropriate because there is a disputed fact material to the case. The District Court may not resolve the factual

> issue, it must merely identify it and await the full presentation of evidence at trial for resolution.' Parker, 741 F.2d at 980. ... because pretrial discovery provides the plaintiff with an opportunity to show that discriminatory motive was determining factor in the employment decision." Kephart, 630 F.2d at 1224; Parker, 741 F.2d at 981.

It is difficult to believe that petitioner's case was in the same circuit -- but it was!

THE TIMELINESS ISSUE

Petitioner knew that this writ of certiorari would be refused by the clerk as jurisdictionally out of time if he did not file within the 90 days allowed. He also knew that it was important to maintain timelinesss at the administrative level, and he did so; however respondent speaks to the contrary with the District Court ignoring the

issue and the Court of Appeals acting as if it was harmless.

In Stuckett v. U.S. Postal Service, 35 FEP Cases 1799, Justice White, with whom Chief Justice Rehnquist joined, dissenting:

> "In Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 28 FEP Cases 1 (1982), we held that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) is not a jurisdictional prerequisite to a Title VII suit against a private employer. The time limit on the filing of a charge is therefore subject to waiver, estoppel, and equitable tolling. In so holding, we settled a conflict among the Courts of Appeals. This case presents a similar question, against the background of a similar conflict, regarding Title VII suits against the Federal Government.
>
> After being fired by respondent, petitioner filed a complaint with the EEOC alleging racial discrimination.

The Commission denied relief, and petitioner then filed suit in Federal District Court. Under 42 U.S.C. 2000e-16(c), the complaint was due within 30 days of petitioner's receipt of notice of the EEOC's final action. The District Court determined that petitioner had missed this deadline and dismissed for want of jurisdiction. Fed. Rule Civ. Proc. 12(b)(1). The Court of Appeals affirmed, stating that 'the time limits for filing Title VII actions against the federal government are jurisdictional.' App. to Pet. for Cert. 2. The court relied on Sims v. Heckler, 725 F.2d 1143, 33 FEP Cases 1786 (CA7 1984), which held that a federal employee's failure to file a timely administrative charge barred a later suit. Sims concluded that considerations of sovereign immunity made the principles underlying Zipes inapplicable when the defendant is the Federal Government.

The position of the Seventh Circuit directly conflicts with that of three Courts of Appeals. See Martinez v. Orr, 738 F.2d 1107, 35 FEP Cases 367, No. 83-1345 (CA10 July 11, 1984); Milam v. United States Postal Service, 674 F2d. 860, 28 FEP

Cases 1387 (CA11 1982); Saltz v. Lehman, 672 F.2d 207, 28 FEP Cases 289 (CADC 1982) (time limit for filing with EEOC). The Ninth Circuit might be added to this list, though its position is unclear. See Cooper v. Bell, 628 F.2d 1208, 1213 and n. 10, 24 FEP Cases 855 (1980); Ross v. United States Postal Service, 696 f.2d 720, 30 FEP Cases 1712 (1983); Rice v. Hamilton Air Force Base Commissary, 720 F.2d 1082, 1083-1084 and n. 1, 33 FEP Cases 468 (1983).

Whether tolling would be appropriate in this case if the time limit is not jurisdictional was neither argued nor considered below. Because the complaint was dismissed under Rule 12(b)(1), the question of the jurisdictional significance of the 30-day limit is squarely presented. In light of the conflict among the lower courts. I would grant certiorari."

Since Justice White's remarks of October 9, 1984, the Sixth Circuit has spoken on the timeliness issue in Bobby v. Dean, 45 FEP Cases 588, stating, inter alia:

"The District Court concluded that the 30-day period for bringing a complaint to the attention of an EEO counselor is a jurisdictional prerequisite for filing an action in District Court. This was the holding in Sims v. Heckler, 725 F.2d 1143, 33 FEP Cases 1786 (7th Cir. 1984). Other courts of appeals that have considered the questions have disagreed with Sims. E.g. Henderson v. United States Veterans Administration, 790 F.2d 436, 440, 40 FEP Cases 1524 (5th Cir. 1986, 45 FEP Cases 395 (4th Cir. 1985); Boyd v. United States Postal Service, 752 F.2d 410, 414, 36 FEP Cases 1417 (9th Cir. 1985); Saltz v. Lehman, 672 F.2d 207, 208, 28 FEP Cases 289 (D.C. Cir. 1982). The courts that have found the requirement not to be jurisdictional have relied on the Supreme Court's decision in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 28 FEP Cases 1 (1982)...

We agree with the courts that have applied the Zipes rationale to the counseling requirement of 29 C.F.R. 1613.214(a)....

The eleventh circuit stated in Ross v. Postal Service, 45 FEP Cases 312, inter alia:

"The district court, relying on Newbold v. United States Postal Service, 614 F.2d 46, 47, 23 FEP Cases 1768 (5th Cir.), cert. denied, 449 U.S. 878, 101 S.Ct. 225, 66 L.Ed.2d. 101, 23 FEP Cases 1844 (1980), dismissed for lack of subject matter jurisdiction because of untimely filing. Newbold, a former Fifth Circuit case relying on Eastland v. Tennessee Valley Authority, 553 F.2d 364, 15 FEP Cases 1115 (5th Cir.), cert. denied, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479, 16 FEP Cases 146 (1977), held that no subject matter jurisdiction existed under section 2000e-16(c) and other relevant provisions of Title VII when the plaintiff fails to timely file suit after receipt of E.E.O.C.'s denial of his claim. 614 F.2d at 47. Eastland, however, was effectively overruled in Milam v. United States Postal Service, 674 F.2d at 862. In Milam, the Court addressed the dismissal of a complaint for lack of subject matter jurisdiction which was filed on Monday, the thirty-first day after receipt of final agency action and outside the section 2000e-16(c) time limitation. The district

court, relying on Eastland, had held the limitation to be jurisdictional. The Milam Court reversed. The Court stated that Eastland was no longer good law and cited Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234, 28 FEP Cases 1 (1982), Sessions v. Rusk State Hosp., 648 F.2d 1066, 1069, 26 FEP Cases 779 (5th Cir. Unit A 1981), and Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 587-95, 592 n.15, 25 FEP Cases 433 (5th Cir. 1981) (en banc.). The Court held that timely filing is not a pre-requisite to federal jurisdiction. 674 F.2d at 862.

Several other circuits have come to the same conclusion. Se Hornsby v. United States Postal Service, 787 F.2d 87, 40 FEP Cases 615 (3d Cir. 1986); Henderson v. United States Veterans Admin., 790 F.2d 436, 440 n.4, 40 FEP Cases 1524 (5th Cir. 1986) (citing Oaxaca v. Roscoe, 641 F.2d 386, 388, 26 FEP Cases 31 (5th Cir. 1981)); Zografov v. V.A. Medical Center, 779 F.2d 967, 45 FEP Cases 395 (4th Cir. 1985); Martinez v. Orr, 738 F.2d 1107, 35 FEP Cases 367 (10th Cir. 1984); Saltz v. Lehman, 672 F.2d 207, 28 FEP Cases 289 (D.C. Cir. 1982).

The position of some circuits is not clear. See, e.g. Scott v. St. Paul Postal Service, 720 F.2d 524, 33 FEP Cases 544 (8th Cir. 1983), cert. denied, 465 U.S. 1083, 104 S.Ct. 1453, 79 L.Ed.2d 770, 34 FEP Cases 192 (1984) (affirming dismissal for lack of subject matter jurisdiction, but, referring to the requirement as a statute of limitations and stating that equitable tolling was not appropriate on the facts given). The Seventh Circuit has held that while the filing requirements of section 2000e-5(f)(1), relating to private defendants, is nonjurisdictional, the doctrine of sovereign immunity compels a different result when the federal Government is a party defendant. Sims v. Heckler, 725 F.2d 1143, 33 FEP Cases 1786 (7th Cir. 1984). See also Rice v. Hamilton Air Force Base Commissary, 720 F.2d 1082, 1083, 33 FEP Cases 468 (9th Cir. 1983).

The issue has not been squarely addressed by the United States Supreme Court, but two justices appear ready to resolve the conflict. See Stuckett v. United States Postal Service, 469 U.S. 898,

105 S.Ct. 274, 83 L.Ed.2d 210, 35 FEP Cases 1799 (1984) (White, J., and Rehnquest, J., dissenting from denial of petition for writ of certiorari); see also Cooper v. United States Postal Service, 471 U.S. 1022, 105 S.Ct. 2034, 85 L.Ed.2d 316, 37 FEP Cases 951 (1985) (White, J., dissenting).

The fourth circuit in Zografov v. V.A. Medical Center, 45 FEP Cases 396, states, inter alia:

> "The courts of appeal have split on the question of whether the thirty-day time limit contained in 29 C.F.R. 1613-214(a)(1) constitutes a limit on a federal court's subject matter jurisdiction to consider EEO complaints filed by federal employees against their respective federal employers. See Donovan v. Hahner, Foreman & Harness, 736 F.2d 1421, 1426 (10th Cir. 1984) (noting split). The Seventh Court Circuit has held that the time limit is a jurisdictional bar for untimely EEO complaints against the federal government on a sovereign immunity theory in Sims v. Heckler, 725 F.2d 1143, 1145-46, 33 FEP Cases

1786 (7th Cir. 1984). Other courts of appeal, including our own, have rejected the sovereign immunity theory as a basis for concluding that exhaustion of administrative remedies is not jurisdictionally required of federal employees seeking Title VII relief. See, e.g., Aronberg v. Walters, 755 F.2d 1114, 1116, 45 FEP Cases 522 (4th Cir. 1985); Boyd v. USPO, 752 F.2d 410, 36 FEP Cases 1417 (9th Cir. 1985); Martinez v. Orr, 738 F.2d 1107, 1110, 35 FEP Cases 367 (10th Cir. 1984); Milam v. USPO, 674 F.2d 860, 28 FEP Cases 1387 (11th Cir. 1982); Saltz v. Lehman, 672 F.2d 207, 28 FEP Cases 289 (D.C. Cir. 1982). Because the Supreme Court held that failure to comply with the thirty-day time limit was not an absolute bar in the private context, but rather a statute of limitations that is subject to equitable tolling in appropriate circumstances, see Zipes v. TWA, 455 U.S. 385, 28 FEP Cases 1 (1982), the court in Martinez concluded that the thirty-day limit was not a jurisdictional bar in the public context either. Id. In our own circuit, in another context, we have held that failure to exhaust administrative remedies is not

> a jurisdictional bar for federal employees seeking relief under Title VII. Aronberg v. Walters, 755 F.2d 1114, 1116, 45 FEP Cases 522 (4th Cir. 1985). Given this recent precedent in our own circuit (which the district court, of course, could not have anticipated), we must conclude that the district court in this case incorrectly construed the thirty-day limit in 29 C.F.R. 1613.214(a)(1) as a limit on the district court's subject matter jurisdiction, rather than as a simple failure to exhaust administrative remedies. We therefore conclude that the thirty-day time limitation may be subject to estoppel in appropriate circumstances."

Perhaps this Court will take this opportunity to resolve the timeliness issue regarding the public sector. Some of the Courts thinking is in Crown, Cork & Seal Co. v. Parker, 31 FEP Cases 1700, June 13, 1983, stating, inter alia:

> "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from

sleeping on their rights, see Delaware State College v. Ricks, 449 U.S. 250, 256-257, 24 FEP Cases 827, 830 (1980); American Pipe, 414 U.S., at 561 (concurring opinion); Burnett v. New York Central R. Co., 380 U.S. 424, 428 (1965)."

The De Novo Issue

Senior District Judge Bernard M. Decker, the United States District Court for the Northern District of Illinois, Eastern Division, stated in his adverse decision on page 3 in footnote 2 that "the plantiff is entitled to a de novo consideration of the merits of his claims. However, the court is not required to ignore the careful and comprehensive analysis of the EEOC." It is the belief of petitioner that the district judge does not have the authority to deny a de novo trail to petitioner and be consistent with Court's

views in Chandler v. Roudebush, 12 FEP Cases 1368, June 1, 1976.

Chandler, states, inter alia:

> "The Court of Appeals held that 'the district judge faced with a demand for a trial de novo is entitled to determine, at a pretrial conference or other wise, why the plaintiff believes that a trial de novo is necessary,' 515 F.2d at 255, 10 FEP Cases, at 691-692, and concluded that the petitioner had presented 'nothing before the district court to indicate that a useful purpose would be served by having a trial de novo.' Ibid. This approach substantially parallels the holding in Hackley v. Johnson, supra, that 'the trial de novo is not required in all cases. The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take testimony to

supplement the administrative record, or grant the plaintiff relief on the administrative record.' 360 F.Supp., at 1252, 6 FEP Cases, at 83.

Nothing in the legislative history indicates that the federal sector 'civil action' was to have this chameleonlike character, providing fragmentary de novo consideration of discrimination claims where 'appropriate,' 360 F.Supp., at 1252, 6 FEP Cases, at 83, and otherwise providing record review. On the contrary, the options which Congress considered were entirely straightforward. It faced a choice between record review of agency action based on traditional appellate standards and trial de novo of Title VII claims. The Senate committee selected trial de novo as the proper means for resolving the claims of federal employees. The Senate broadened the category of claims entitled to trial de novo to include those of private sector employees, and the Senate's decision to treat private and federal sector employees alike in this respect was ratified by the Congress as a whole."

Therefore, it is too late in the day to allow lower courts to deny petitioner of his day in court.

Despite the fact that the Seventh Circuit denied petitioner a de novo trail, it seem to approve of same in Kontos v. Dept. of Labor, 45 FEP Cases 302, at footnote 4:

> "At oral argument, a question was raised as to whether OCR and Commission decisions, which deny tolling under 1613.214(a)(4), are entitled to deference in federal court proceedings. The parties submitted supplemental briefs on the issue and agreed that the agency decisions were properly reviewed de novo by the district court. We agree that such decisions are entitled to de novo review. While it is well settled that federal employees, like private sector employees, must receive plenary review of all administrative decisions rendered on the merits of their claims, see Chandler v. Roudebush, 425 U.S. 840, 12 FEP Cases 1368 (1976),

1613.214(a)(4) arguably vests significant power to make tolling decisions (versus a decision on the merits) in the agency. The regulation states that the 'agency' shall extend the time limits in this section .... (emphasis added). Thus, 1613.214(a)(4) seems to emphasize the agency's role in the decision process, which lends support to the view that the federal courts should defer to agency rulings. However, we do not take such a narrow view because it ignores the emphasis placed by the Supreme Court in Chandler on the remedial nature of the legislation. Absent a more affirmative indication from the legislative scheme of the ADEA or Title VII that deference should be accorded the agency decision, we cannot dismiss or undermine the rationale of Chandler. Moreover, in the context of ADEA cases, it is important to add that the weight of authority indicates that federal employees have the option to exhaust their administrative remedies by bypassing the procedures and simply notifying the employer of their intent to sue. See 29 C.F.R. 1613.501.521; Castro v. United States, 775 F.2d

> 1411, 1424-25, 45 FEP Cases 398 (8th Cir. 1987) (reserving judgment on the issue). As a result, it would indeed be inconsistent with the language of the ADEA, which divests authority from the agency, to adopt a deference standard. Therefore, we explicitly uphold the long-presumed position that all agency decisions involving federal employee discrimination claims are entitled to de novo review in the federal courts."

Here we have a situation in Kontos where the United States Court of appeals for the Seventh Circuit is claiming it "explicitly uphold the long-presumed position that all agency decisions involving federal employee discrimination claims and entitled to de novo review in the federal courts." Yet at nearly the same time the court was supporting de novo trial (8/5/87 -Kontos vs 9/24/87 - Hale) it was in the process of affirming an adverse decision of the district court

that denied petitioner, a federal employee, a de novo trial. Where is consistency?

Petitioner will speak to the so-called "careful and comprehensive analysis of the EEOC." EEOC prcedures do not allow discovery or prehearing depositions. Only certain witnesses are permitted. Mary Fulmer, witness for petitioner, was not permitted because at the time of hearing she was no longer in OSHA employ and there was no mechanism for compelling her presence at the agency hearing that resulted in such a "careful and comprehensive analysis." Ms. Fulmer would have testified that one of the white panel members that denied petitioner certification made a statement in her presence that blacks were not long out of the trees because he had served a

tour in Africa in World War II and knew from personal experience.

Although the EEOC complaints examiner in this instant case was an attorney there is no requirement that should be the situation. His conclusions and findings were in the nature of recommendations to the agency head who makes the final agency determination as to whether discrimination exists. EEOC proceedings clearly do not guarantee federal employees a full and fair hearing on their claims of employment discrimination, and yet the district judge stated that he was "not required to ignore the careful and comprehensive analysis of the EEOC."

Despite the fact that on April 19, 1982, district Judge Thomas R. McMillen remanded petitioner's class action back

to the agency for processing (see pages 121-129) EEOC refused to process the complaint as a class action. Complaints examiners avoid class action cases because of the need to establish "production." Therefore, their decisions are expected to be self-serving rather than giving a "careful and comprehensive analysis." EEOC hearings lack the necessary impartiality.

In addition, Kontos is not the only case where the Seventh Circuit spoke on the de novo issue. In Caro v. Shultz, 11 FEP Cases 327, September 3, 1975, stating, inter alia:

> "U.S. Government employee bring action under Section 717 of Civil Rights Act of 1964 following exhaustion of administrative remedies is entitled to trial de novo. (1) Under Section 717(d), provisions of Section 706 (f) through (k) of Act, which U.S. Supreme Court decided in

Alexander v. Gardner-Denver Co. (7 FEP Cases 81) provide for trial de novo in private Title VII actions, govern Title VII actions by U.S. Government employees 'as applicable,' and these words do not limit de novo review; (2) legislative history reveals that Congress intended U.S. Government employees to have as full a panoply of procedural remedies as those afforded private sector litigants. ....

In the present case, the plainiff is entitled to pursue discovery and to supply appropriate materials in opposition to the Government's motion for summary judgment. If the existence of any genuine issue of fact as to any employment discrimination then remains, the case must proceed to trial. As held in Sperling, "if summary judgment is not granted, the agency record is admissible in evidence at trial when appropriate under the applicable Federal Rules of Civil Procedure and of Evidence. And, as in any other civil action, the aggrieved federal employee must prove his or her discrimination claim by a preponderance of the evidence." 515 F.2d at 484, 10

FEP Cases at 669.

> Without passing on the merits of her claim, it appears from the record that plaintiff may be able to oppose summary judgment successfully. In that event, she will be entitled to a full rial before the district court and an independent decision on her claims."

Another district judge from the Seventh Circuit made the decision that the district judge in this instant case should have made by stating in Bashaw v. U.S. Dept. of Treasury, 29 FEP - Cases 1232, April 11, 1979, inter alia:

> "In Chandler vs. Roudebush, 425, U.S. 840, 12 FEP Cases 1368 (1976), the Court held that federal employees proceeding in federal court under 42 U.S.C. 2000e-16 have a right to a trial de novo of their claims of discriminiation. Thus, under Chandler, this court is required to do more than merely review the previous administrative determinations of the plaintiff's claims.
>
> Chandler does not necessarily preclude the use

of summary judgment to dispose of claims brought under 2000e-16. Mahroom v. Hook, 563 F.2d 1369, 1376, 16 FEP Cases 130 (9th Cir. 1977). Nor does that case preclude this court from basing its resolution of this case on the administrative record if the parties were to stipulate that they have no evidence to add to that record. Nonetheless, on the current state of the record in this case, I am not persuaded that summary judgment as to Ms. Bashaw's sex discrimination and reprisal claims would be appropriate.

Under Rule 56, Federal Rules of Civil Procedure, summary judgment is only proper where there are no material facts in dispute and the movant is entitled to judgment as a mattrer of law. Specifically with regard to claims brought under 42 U.S.C. 2000e-16, the court of appeals for this circuit has stated 'if the existence of any genuine issue of fact as to any employment discrimination then remains, the case must proceed to trial.' Caro v. Schultz, 521 F.2d 1084, 1089, 11 FEP Cases 327 (7th Cir. 1975). In Staren v. American National Bank and Trust Co., 529 F.2d 1257, 1261-62 (7th

Cir. 1976), the court also noted with regard to summary judgment:

In summary judgment procedure the trial court should not weigh the evidence of the plaintiffs against that of the defendants. That is the function of the fact finder at trial."

The Discovery Issue

Petitioner expressed thoughts on this issue in his appeal to the appellate court on pages 121 through 129 and there is no need to repeat them here.

However, there is two cases from the Seventh Circuit on discovery that should be noted. The first and most important case is Cedillo v. Iron Workers, Local 1, 24 FEP Cases 1196, July 6, 1979, inter alia:

"Our conclusion is particularly influenced by the effective denial of plaintiff's requests to obtain the discovery of statistical data needed to establish fully

his claim of the disparate impact of the ostensibly neutral exclusions. See Toebelman v. Missouri Kansas Pipe Line Co., 130 F.2d 1016 (3d Cir. 1942); Penn Galvanizing Co. v. Lukens Steel Co., 59 F.R.D. 74, 80 (E.D.Pa. 1973). The dissent considers pivotal the failure of the plaintiff to contravene the 'fact' that the Union had admitted no transfer members at all during the relevant time period. However, we view the plaintiff's case as not requiring that he opposed that fact but rather that he substantiate the inference which he contends can be drawn from it. In addition, where the need for discovery in order to obtain the requisite statistical data to substantiate the claims asserted is clear, and where plaintiff was effectively denied the opportunity to engage in that discovery, we hold that entry of summary judgment is inappropriate. Thus the judgment must be reversed and this case remanded for prompt determination of class certification and for discovery to proceed in order to afford plaintiff 'a fair opportunity to show that the employer's stated reason for

> the employee's rejection was in fact pretext.' McDonnell, supra, 411 U.S. at 804, 5 FEP Cases at 970."

The Second Seventh Circuit Case that the petitioner could find on discovery was Eggleston v. Plumbers' Local 130, 26 FEP Cases 1202, stating inter alia:

> The Supreme Court in Hickman v. Taylor, 329 U.S. 495, 507 (1947), acknowledged that "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case," but the Court also stated that discovery "has ultimate and necessary boundaries." In a simple discrimination case such as this one, where the only current discovery issue relates to class certification, although concededly an important issue, the "fising license" nevertheless need ordinarily be only a limited one with an early expiration date. "It is well established that discovery has limits and that these limits grow more formidable as the showing of need decreases." United Air

Lines, Inc. v. United States, 26 F.R.D. 213, 219 n.9 (D.Del. 1960)...

In addition, the District Court in the Northern District of California in Fleming v. Simon, 9 EPD ¶10, 214, June 4, 1975, stated, inter alia:

> "Claimant was entitled to discovery to supplement the administrative record and was entitled to propound properly framed interrogatories for that purpose. 42 U.S.C. Secs. 1981 and 2000e."

The Class Action Issue Prior To Merits Determination

Evidently the Seventh Circuit does not believe this Honorable Court in Eisen v. Carlisle & Jacquelin, 9 FEP Cases 1309, May 28, 1974, stating, inter alia:

> "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such 'as soon as practicable after the commencement of the action ...' In short, we agree with Judge Wisdom's conclusion in Miller v. Mackey International, 452 F.2d 424 (CA5 1971), where the court rejected a preliminary inquiry into the merits of a proposed class action:

'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.' Id., at 427."

Notwithstanding this court's position on the requirements of Rule 23, Senior District Judge Bernard M. Decker refused to deal with petitioner's class complaint and the United States Court of Appeals for the Seventh Circuit sanctioned in conflict with Commisford v. General Mills, Inc., 22 EPD #30, 645, December 20, 1979, inter alia:

> "First, the certification determination is typically made prior to extensive discovery. Class action plaintiffs generally do not have broad access to discovery to support their class claims prior to certification. This practical difficulty has caused the courts to be liberal in their assessment of class action complaints against the standards for certification set forth in Rule 23.
>
> This liberality in construing class action discrimination complaints is viewed as particularly appropriate by virtue of the important constitutional questions intrinsic to such

> suits. In general, the Courts have favorably regarded the class action as a means to effect the broad remedial purposes of the anti-discrimination laws. In several federal jurisdictions, concerns over class action plaintiffs' discovery difficulties and constitutional rights have coalesced to produce an "across the board" approach to class certification in discrimination suits. See Johnson v. Georgia Highway Express Inc., 2 EPD #10, 119, 417 F.2d 1122 (5th Cir. 1969).
>
> What this approach has meant in many of the cases cited in the parties' briefs is that plaintiffs are granted a broad conditional certification very early in the proceedings. Defendants have been protected against abuse of the liberal standard of initial class review by Rule 23's provisions for amendment or alteration of the early class certification."

Circuit Judge John L. Coffey was one of the panel members and yet he wrote in Davis v. Ball Memorial Hosp. Assn. Inc., 753 F.2d 1410 (1985), inter alia:

In Geraghty, (United States Parole Commission v. Geraghty, 445 U.S. 388, 407 n.12, 100 S.Ct. 1202, 1214 n.12, 63 L.Ed.2d 479 (1980)), the Supreme Court reasoned that 'a plaintiff who brings a class action presents two separate issues for judicial resolution. One being the claim on the mertis and the other being the claim that he is entitled to represent a class. The denial of class certification stands as an adjudication of one of the issues indicated.' 445 U.S. at 388-89, 100 S.Ct. at 1205 (quoting Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326, 336, 100 S.Ct. 1166, 1173, 63 L.Ed.2d 427 (1980)). In the present case, Davis and Bright have 'continued vigorously to advocate their right to have a class certified.' Geraghty, 445 U.S. at 404, 100 S.Ct. at 1212. Thus, under the Supreme Court's reasoning in Geraghty and Roper, even though Davis and Bright are no longer members of the statewide class, they may continue to press the appeal of the district court's class decertification order. See Geraghty, 445 U.S. at 404, 100 S.Ct. at 1212."

Chief Judge William J. Bauer's views in Clift v. UAW, 818 F.2d 623 (7th Cir. 1987) appear to be in conflict with his actions in petitioner's instant case, stating, inter alia:

> "... the case now before us, the district court made an express ruling on the question of class certification: the court ruled that the certification question was moot. This was not a ruling on the merits of the class certification question which is what plaintiffs apparently still desire, but it is still a ruling on the question. Since there has been a ruling declining to grant class cetification and the district court entered a judgment for the defendants, there is a final judgment which we have jurisdiction to review. Cf. Gomez. 811 F.2d at 1034 n.1.
>
> The district court may have been incorrect when it determined that the class certification question was moot. Compare id.; Glidden, 808 F.2d at 627; Napier v. Gertude, 542 F.2d 825, 827 (10th Cir. 1976), cert. denied, 429 U.S. 1049, 97 S.Ct. 759, 50 L.Ed.2d 765

(1977). But, since that issue has not been properly raised by the plaintiffs on appeal, we will not consider whether we should remand this case for a determination of the merits of the class certification question. Since we uphold the district court's decision on the statute of limitations issue, we also let stand the decision on the unargued (at the appellate level) issue of class certification."

Maintainability Of Class Action

This Court's views on class action is expressed in General Tel. Co. v. Falcon, 28 FEP Cases 1749, 29 EPD #32, 781, June 14, 1982, stating, inter alia:

"The class action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' Califano v. Yamasaki, 442 U.S. 682, 700-701. Class relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.' Id., at 701.

> For in such cases, 'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under Rule 23."

In addition, there was a time when the Seventh Circuit had a different view of class action stating in Bowe v. Colgate-Palmolive Co., 2 FEP Cases 121, September 26, 1969, inter alia:

> "Moreover, in an action brought under Title VII, the charging party and suing plaintiff acts as a private attorney general who 'takes on the mantel of the sovereign.' Jenkins v. United Gas Corp., 400 F.2d 28, 32, 1 FEP Cases 364 (5th Cir. 1968). See also Oatis v. Crown Zellerbach Corp.., 398 F.2d 486, 1 FEP Cases 328 (5th Cir. 1968). When, as frequently happens, the alleged discrimination has been praticed on the plaintiff because he or she is a member of a class which is allegedly discriminated against, the trail court bears a special responsibility court bears a special responsibility in the

public interest to resolve the dispute by determining the facts regardless of the position of the individual plantiff."

Summary

Petitioner is a federal manager supervising a staff of safety and health professionals, and he has been doing this for the past five years; therefore, successfully doing the job that Senior District Judge Bernard M. Decker said he was not qualified to do. Judge Decker's thoughts were compatible with some of the promotional panels deciding petitioner's fate and declaring that petitioner cannot express himself in written form.

The Third Circuit stated it best for petitioner in Jackson v. Univ. of Pittsburgh, 44 FEP Cases 981, August 19, 1987, stating, inter alia:

"In today's climate of public opinion, blatant acts

> of discriminiation the true 'smoking guns' can easily be identfied, quickly condemned and often rectified in the particular settings where they occur. Much of the discrimination that remains resists legal attack exactly because it is so difficult to prove. Discrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered. That is one of the reasons why our legal system permits discrimination plaintiffs to 'prove their cases by direct or circumstantial evidence.' United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3, 31 FEP Cases 609 (1983)."

Therefore, in consideration of the above remarks, petitioner respectfully request this court remand the case to EEOC for the class action processing that was denied petitioner in contrast with the proceedings before the Honorable District Judge Thomas R. McMillen, on April 19, 1982). (See pages 121 - 129).

Petitioner hasnot requested at any point in time more than what Rule 1 of the Federal Rules of Civil Procedure proposes which is the just, speedy, and inexpensive determination of every action.

When petitioner is deprived of his day in court, it thwarts the objective of the remedial effect of Title VII legislation.

The most pernicious effect of racial discrimination is not to the pocketbook, but to the victim's self respect. The out-of-pocket loss occasioned by such discrimination is often negligible in comparison to the physiological and psychological damage caused by the employer's unlawful conduct.

When the lower courts and the administrative agency refused to allow petitioner to proceed with class action in this instant case, he was prevent-

ed from establishing the broad claim of general discrimination on the part of the defendant and therefore not given a level playing field. Title VII allows petitioners to seek redress from discrimination that operates covertly as well as overtly.

The only thing that petitioner asks of the of the only tribunal in the entire land that advertises over its doorway "Equal Justice Under Law" - is simple justice.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
MILWAUKEE DISTRICT OFFICE

Statement of Findings and Recommended Decision in the Discrimination Complaint of Henry H. Hale

EEOC Case No: 051-083-X0123

COMPLAINANT:	Henry H. Hale 1011 Partridge Ln Lake Zurich, IL
COMPLAINANT'S REPRESENTATIVE:	Clincy M. Latimer, Jr. Attorney at Law 1625 Simpson St. Evanston, IL 60201 Evanston, IL 60201
AGENCY:	U.S. Department of Labor
AGENCY REPRESENTATIVE:	Arlene Leland U.S. Department of Labor Office of the Solicitor 200 Constitution Avenue, N.W. Room N-2428 Washington, D.C. 20210

COMPLAINT:	Discrimination Because of Race (Black)
COMPLAINTS EXAMINER:	Reuben Daniels Equal Employment Commission 310 West Wisconsin Avenue Suite 800 Milwaukee, Wisconsin 53203-2211
DATE OF HEARING:	Sept. 24-28, 1985

I. INTRODUCTION:

On September 24, 25, 26, 27 and 28, 1985, the hearing was held in Chicago, Illinois on the discrimination complaint of Henry H. Hale (Complainant) that he was discriminated against by the Department of Labor on the basis of his Race when he was not certified as highly qualified or selected for any of several positions for which he applied during the period between 1978 and 1980. Mr. Hale also alleged the Agency's actions were taken in reprisal for his having filed prior EEO complaints and participated in EEO activites on behalf of other employees.

At the hearing, eleven witnesses testified and twenty-five exhibits were

added to the case record. The parties requests for witnesses and exhibits, objections to those requests and rulings of the Examiner on the requests and objections are set forth in the Prehearing Conference Reports dated January 24, 1984, April 20, 1984, May 21, 1984 and May 29, 1984, attached hereto as Appendices "A", "B", "C" and "D" and incorporated by reference as if fully set forth herein, and in the Hearing Transcript at pp. 3-26. The designation of certain exhibits as Complainant's Exhibits or Agency's Exhibits is merely a reflection of the party offering the exhibit into evidence and the order in which the exhibits were offered at hearing.

Complainant's Exhibits received at the hearing were as follows:

CE-1	Equal Employment Opportunity Plan - Department of Labor (1979)
CE-2	Certificate of Eligibles No. 79-007-OSHA - Cincinnati, Ohio dated 9-17-79
CE-3	Certificate of Eligibles No. 79-067-OSHA -Cleveland, Ohio dated 9-17-79
CE-4	Excerpt from Hearing of 5-6-81 Regarding Charles Beasley (pp. 117-126)
CE-5	Re-evaluation of Position of Safety and Health Manager (GS-018-14)

CE-6 Vacancy Announcement for Safety and Health Manager - Area Director May 5, 1975 RAMO 751-35

Agency Exhibits:

AE-1 Regional Administration and Management Office - Operating Instruction No. 30 dated December 7, 1977

AE-2 Subchapter A-5 Performance Evaluation and Merit Staffing Evaluation (DLS Appendix A, FPM 335)

AE-3 Subchapter A-6 Certification and Selection (DLS Appendix A, FPM 335)

AE-4 Interpretation of the term "Meaningful Distinction" (3/77)

AE-5 Chart of Henry Hale's Ratings in Complaint Cases Regarding Rating Factors in which an "H" is required for a "Highly Qualified" Rating and Certification

AE-6 Subchapter A-5 Performance Evaluation and Merit Staffing Evaluations (page 33)

AE-7 Subchapter A-5 Performance Evaluation and Merit Staffing Evaluations (page 37)

AE-8 Qualification Standards - Section 2, Crediting Experience

AE-9 Merit Staffing Audit Worksheet and Qualification

	Evaluation Sheet for Merit Staffing
AE-10	Compilation of Region V Area Directors by Name, Race, Sex and Office
AE-11	U.S. Department of Labor - Merit Staffing Plan (January, 1971)
AE-12	Position Classification Standards -Safety and Occupational Health Specialist (GS-9)
AE-13	Qualification Rating Examiners Approved Through May, 1980
AE-14	Subchapter 6 - Promotion Records, Reviews and Corrective Actions

AE-15 Position Classification Standards-Safety and Occupational Health Specialist (GS-11)

AE-16 Position Classification Standards -Safety and Occupational Health Specialist (GS-12)

AE-17 Designation of Betty R. Lynt as a Qualified Rating Examiner

AE-18 October 19, 1973 Memo Changing Required Rating Panel Membership from 3 to 2 Persons

AE-19 Merit Staffing Panel Guidelines

The parties were advised at the close of the hearing that each would be

given an opportunity to submit interrogatories to Betty Lynt, Mary Fulmer, William White, Milan Racic and Dr. Eula Bingham. Interrogatories were to be mailed to the Examiner postmarked not later than October 23, 1984. Neither party submitted interrogatories for any of these witnesses.

The Investigative File consists of five volumes each addresssing at least one formal complaint of discrimination. The evidence will be analyzed with respect to the formal complaint, volume of the Investigative File and testimony of the various witnesses addressing each allegation of discrimination.

II. ANALYSIS AND FINDINGS:

It is the burden of Complainant to establish that there is some substance to

his allegations. In proving a case of disparate treatment, it is not always necessary to obtain direct evidence of discriminatory motive. The presence of a discriminatory motive may be inferred from the fact that there were significant differences in treatment between that accorded the Complainant and persons outside his protected class. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1913); International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977); Texas Department of Community Affairs v. Burdine, 101 Sup. Ct. 1089 91981). The prima facie case method established in McDonnell Douglas need not be applied in a rigid or ritualistic manner. It is intended to be a sensible and orderly guide to evaluate the evidence in light

of common experiences as it bears on the critical question of discrimination. This case having been fully heard on the meits, the adequacy of the parties showing at any particular stage of the McDonnell Douglas ritual is of no consequence and the factual inquiry proceeds directly to the specific question of whether Complainant's race or color was a factor in his not being certified to the selecting official as "Highly Qualified" or the decision not be select the Complainant for the positions to which he was certified. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715-716, 75 L.Ed.2d 403, 103 Sup. Ct 1478 (1983). As noted earlier, the question presented to the Examiner is whether Complainant was discriminated

against because of his Race. In order to resolve this issue favorably to Complainant, it is necessary the Examiner find Race was a discernible factor in the employment decision.

It is not necessary the Complainant prove Race was a "substantial" or "determining" factor in the decision but only that a discriminatory reason more likely than not motivated the employer. Bibbs v. Block, 749 F.2d 508, 511-512, 36 FEP 713 (8th Cir., 1984).

A racially integrated workforce does not serve to insulate an employer from liability for discrimination against an individual employee. Connecticut v. Teal, 457 U.S. 440, 454, 102 Sup. Ct. 2525 (1982).

Having read the investigator's files

compiled by the agency, hearing transcripts and exhibits received at the hearing, pre-hearing conference and post-hearing submissions of the parties, the Examiner finds the preponderance of the evidence fully supports the agency's actions on each of the formal complaints. The hearing entailed examination of numerous witnesses as well as a review of the very detailed investigative files. The evidence does not support an inference that the review of Complainant's requests for promotion in accordance with the Merit Promotion Standards were conducted in a discriminatory manner.

The promotional actions at issue were reviewed during the course of the hearing by the agency expert Betty Lynt.

Ms. Lynt had worked as executive secretary to the Board of U.S. Civil Service Examiners and later served as a board member during the period 1947 through 1968. Ms. Lynt authored the X-118 Qualification Standards for a wide variety of jobs at the Department of Labor. She also authored the Merit Staffing Plan for the Department of Labor which was utilized in filling the current positions. As part of her regular duties Ms. Lynt would have been called upon to audit field office compliance with the Merit Staffing Plan and conduct regulatory reviews. (HT 915-920).

Ms. Lynt testified there were two categories of personnel eligible to serve on Merit Staffing Panels. The first category is persons who are expert in the

subject matter for which applicants are being sought. The second category of persons eligible to serve on a Merit Staffing Panel are those skilled in the evaluation of the experience, education, and training of applicants for a position in accordance with the X-118 standards. (HT-922 through 923, AE 2, 11).

Applications are initially screened by Personnel Staffing Specialists to determine which applicants are minimally qualified to fill the position for which a vacancy announcement had been issued soliciting applications. All persons meeting minimal qualifications for the announced position are referred to the Merit Staffing Panel for consideration and rating. Complainant was found minimally qualified for all positions to

which he applied and was rated by a Merit Staffing Panel. (HT 925-928).

At the time of hearing Ms. Lynt was overseer of the Merit Staffing Program in the Office of Policy and Standards. Ms. Lynt participated in management and regulatory reviews of the agency's 18 personnel offices, and developed policy issuances such as the Merit Staffing Plan and conducted training for personnel responsible for implementation of the Merit Staffing Program. The regulations identify the information to be considered in the rating process and instructs the panel in the proper methodology for scoring and documentation of evaluation factors. Ms. Lynt testified and my review fo the regulations show they are written in a positive manner to instruct

the panelists in the proper methodology by which candidates are rated. The regulations do not list all the things one should "not do" in the rating process because as a practical matter it is extremely difficult to anticipate all errors a person or persons are likely to make in the rating process. (HT 929-939, 958-961, 986-990; AE 6, 7, 9, 11 and 19).

Volume I.

The issue addressed by the agency investigation and at hearing was:

> Whether the Complainant was discriminated against on the basis of Race (Black) when he was not certified for the position of Safety and Health Manager GS-018-14, Region III, Charleston, West Virginia Area

Office, under Vacancy Announcement OASAM 78-139?

Complainant contends that he was improperly evaluated by the Merit Staffing Rating Panel for the position of Safety and Health Manager and as a result of discrimination was not certified as highly qualified for the position in question and consequently not selected for the GS-14 position of Safety and Health Manager. Complaint cited numerous bases in support of his allegation of discriminatory conduct by the rating panel and the selecting officials. (Volume I, IE B, C, E-5).

The Regional Administrator for Region III during all times pertinent to the present complaint was Mr. David H. Rhone. Leo Carey, Area Director of the

Wilkesboro, Pennsylvania office served as chairman of the panel responsible for rating applicants and issuing the certificate of eligibles to Mr. Rhone. (Volume I, IE D-2, E-2).

The evidence showed the Charleston, West Virginia, Area Office vacancy occurred on or about March 18, 1978, when the incumbent director, Charles Martin, died. The only supervisor employed in the area office at the time of Mr. Martin's death was the ultimate selectee, Stanley Elliott who was detailed to fill the area director's position by Mr. Rhone. A formal request to fill the area director vacancy was forwared to the Personnel Division on April 5, 1978. The request was cleared by classification on April 7, 1978 and sent to the Staffing

Section on that date. The position was announced on May 1, 1978. The evidence showed Mr. Elliott had sufficient time in grade to qualify for the position as of April 10, 1978. The request to fill the position was made within thirteen working days of the vacancy. (Volume I, IE D-1, D-2, E, E-2, E-7: HT 34-38, 88-90).

Leo Carey had served as area director of the Wilkesboro, Pennsylvania, office since July 4, 1976. He was a board certified Industrial Hygienist and prior to appointment as an Area Director had served on panels rating applicants for GS-12, 13, and 14 positions prior to July, 1978. (HT 24-28).

The panelists for the position were selected by a personnel staffing specialist in the OSHA Regional Office.

(HT 28-34). There is no credible evidence the panelists had contact with the Regional Administractor or other agency officials so as to unduly influence their activities while sitting on the panel.

Panelists were instructed to use any documents submitted by the applicant in rating their qualifications. The criteria by which the applicants were to be rated were stated on the Qualification Evaluation Sheet for Merit Staffing and were the same as included in the vacancy announcement. (Volume I, IE 1, 3; AE 6, 7, 19).

The Complainant was found to be qualified for the position in question but not certified to the selecting official because he was not rated "highly

qualified" by the panel. The evidence showed the Complainant's application and request for re-evaluation did not reflect the level of knowledge, skills and experience which the panel would have considered necessarey to receive a rating of "highly qualified". Although the Complainant was not compared against any of the other applicants during the rating process, a subsequent comparison of the applications of the Complainant and that of the selectee, Stanley Elliott, showed significant differences in the experience reflected in their applications and supporting performance evaluations. The selectee's performance evaluations showed approximately eight years of management experience while that of the Complainant did not. The selectee's application and

performance reviews showed dual experience in both hygiene and safety which was not reflected in the Complainant's submissions to the Rating Panel. The performance appraisals of the selectee were considered superior to those received by the Complainant and combined with the proceding factors account for the selectee's receiving the rating of "highly qualified" and being certified to the selecting official. (HT 28-30, 91-98, 103-104, 958-969; Volume I IE - E-1, 3, 4, 5, 6, 7; AE - 5, 6 and 7).

The ratings of the panel are supported by a preponderance of the evidence. I find no basis upon which to infer the manner in which the panel was selected or the activities of the panel

in failing to certify the Complainant for the position of Safety and Health Manager was based upon a consideration of Complainant's race.

The allegation that the vacancy announcement was delayed in order to allow Mr. Elliott to acquire sufficient "time in-grade" to qualify for the position is also without merit. The uncontroverted evidence showed the request to fill the Area Director vacancy was made within thirteen working days of the unexpected occurrence of the vacancy. Complainant could not demonstrate this delay was unreasonable or a pretext for discrimination. The Complainant acknowledged that in his more recent experience as a Manager a delay of up to one (1) month can be anticipated in

getting a vacancy announced. (HT 885-86).

VOLUME II.

The issue addressed by the agency investigation and hearing was:

> Whether the Complainant was discriminated against on the basis of his Race (Black) when he was not selected for the the position of Safety Program Manager, GS-301B-14, OSHA Region IV, Atlanta, Georgia, under Vacancy Announcement AR58-79?

On April 30, 1979, Complainant filed a formal complaint of discrimination alleging Robert A. Wendell, Regional Administrator, Region IV, denied him a promotion in favor of a lesser qualified

white male due to his Race. Complainant alleged the telephone interview conducted with him by the selecting official was a pretext to mask racial discrimination and the selectee was allowed. because of his race (White), to use illegally obtained experience to qualify for the position. (Volume II IE - B, C; HT 758-761).

The Complainant received high ratings on all elements of the "qualification evaluation sheet" for Merit Staffing used by the panel and was certified to the selecting official on the certificate of eligibles. Alan McMillan was also certified to the selecting official. The panel used all qualifying experience reflected in the applicants SF-171, performance evaluations and supporting documentation

irrespective of how the experience was obtained. (HT 970-983; Volume II, IE -D, F, F2, F4, F5, F6; AE 8).

The position of Safety Program Manager resulted from an audit of the selectee's previous position by the General Accounting Office and Office of Personnel Management. OPM questioned whether Mr. McMillan had the required specialized experience to hold the then existing position in Atlanta and ordered the position abolished and re-announced. The incumbent, Mr. McMillan, was allowed to compete for the position as announced. Mr. McMillan had basically performed the job as announced in Atlanta since 1976. In addition he had served as Assistant Regional Administrator for training, education and consultation in federal

agency programs for approximately ten months during this time period. Subsequent to receiving the contested promotion, Mr. McMillan entered the Senior Executive Service Program and in 1981 was assigned as Regional Administrator for Region V in Chicago. In July, 1983, Mr. McMillan received a promotion to his current position of Regional Administrator, Region IV, Atlanta. (HT 612-614, 623-626).

The preponderance of the evidence does not support the inference that Race was a factor in the agency's decision to announce the position of Safety Program Manager in Atlanta, allow Mr. McMillan, the selectee, to compete for the position or in the selecting official's decision to select the prior incumbent, Mr.

McMillan, to fill the position. There is no evidence the rating panel which found both the selectee and the Complainant "highly qualified" for the position was influenced by any agency official to illegally credit experience to Mr. McMillan in order that he may be certified to the selecting official as highly qualified. Mr. McMillan had extensive management experience dating from his appointment as Management Officer of OSHA in Region VI in 1973. The selectee had extensive background in the development and implementation of OSHA training program at the state and national level.

The Examiner finds no evidence to support Complainant's contention that the personnel actions were influenced by

consideration of his Race. The evidence does not show Mr. McMillan was "illegally" allowed to obtain experience in the precedent position. The preponderance of the credible evidence supports the Agency's actions in this case.

Volume III.

The issue addressed by the agency investigation and at the hearing was:

> Whether the Complainant was discriminated against on the basis of his Race when the certificate issued on or about June, 1979, listing Complainant as one of three certified candidates for two area director positions in Cincinnati and Cleveland, Ohio, were cancelled?

The hearing and investigation also addressed the issue of whether the Complainant was discriminated against on the basis of his Race (Black) when the second panel did not certify him for the two area director positions in Cincinnati and Cleveland, Ohio, (Safety and Health Manager) pursuant to Vacancy Announcements 39-007-OSHA (Cincinnati), 79-067-OSHA (Cleveland)?

The evidence showed the June, 1979, panel failed to follow Merit Staffing guidelines in rating the candidates. The audit sample showed candidates were compared with each other to determine ratings which procedure is improper and

contrary to the instructions provided the panelists at the time of the rating. (HT 96-190; Volume III IE - A-9; AE - 6, 7, 9, 19).

The members of the original Merit Staffing Panel - James Epps (black male), ary Fulmer (white female) and Harry Hutton (white male) had certified one black male, one white female and one white male as highly qualified for the position. The subsequent panel consisted of three white males and declined to certify the Complainant as "highly qualified" to the selecting official. The June, 1979 panelists were not advised of the reason for the cancellation of their Certificate of Eligibles and believed the Regional Administrator took the action because he was displeased that

some of his favorite applicants were not certified by the panel. (Volume III IE - C, C-1, C-2 and C-3).

The evidence adduced at hearing clearly demonstrated a valid non-discriminatory reason for cancellation of the June, 1979 Certificate of Eligibles, which the Complainant has failed to demonstrate was pretextual. The Merit Staffing audit worksheet and Qualification Evaluation Sheets for Merit Staffing for each of the applicants clearly showed the panelists compared the training and experience of applicants with that of other applicants they were rating in order to arrive at some of the ratings assigned the various candidates during the review process. Robert Jur, Regional Personnel Officer, testified

that he believed the possible violation of the Merit Staffing guidelines was brought to his attention by Eileen Hurley, Supervisory, Personnel Specialist, and it was thereafter recommended to the Regional Administrator, Ronald J. McCann, that the Certificate of Eligibles be cancelled and the position repaneled. This decision was also affected by the fact that approximately one-third of the applicants reviewed by the June, 1979, panel who were not certified as "highly qualified" requested reconsideration. There is no evidence that Mr. Jur or Mr. McCann selected the persons to serve on either panel or otherwise attempted to influence the ratings assigned to the candidates. (HT 160-170, 240-255, 279-

280, 309-315; AE - 9, 19).

The second panel composed of Steven Mallinger, Zolton Bagdy and Milan Raci rated Complainant "medium" in the critical areas respecting ability to conduct complex investigations and supervisory and managerial skills, thereby preventing Complainant from obtaining the necessary rating of highly qualified in order to appear on the certificate of eligibles referred to the selecting offical.

Zolton Bagdy testified that in rating the Complainant the panel drew a distinction between "technical expertise" and "administrative skills". Administrative skills are more directly related to the logistical operation of an office, i.e. personnel administration,

finance and contracting for services. These types of responsibilities are normally shared by both the supervisor and area director in an area office. Complainant's performance evaluations and SF-171 did not reflect supervisory experience at the OSHA Training Institute or other indicia that thoseadministrative skills had been developed. Complainant had stated that he served as a team or project leader on an interim basis but it was not clear from the application or performance reviews whether Complainant had actually performed supervisory duties. Complainant later acknowledged on cross examination that he was a bargaining unit employee from 1976 through 1980 and as such did not prepare performance evaluations of employees or

exercise supervisory controls over fellow employees. (HT 402-408, 418-429; 864-865).

The evidence supports the non-discriminatory basis for the ratings given the Complainant and selectee by the second panel. The Complainant has failed to demonstrate the actions by the second panel, Regional Personnel Officer or Selecting Official were based upon a discriminatory animous or as a pretext to mask discriminatory motives.

Volume IV.

The issue addressed by the agency investigation and at hearing was:

> Whether the Complainant was discriminated against on the basis of his Race (Black) when he was not

certified for the position of Safety and Health Manager (GS-14), Niles Illinois Area Office, Region V, under Vacancy Announcement 78-327-OSHA?

The vacancy announcement for this Area Director's position listed seven key factors upon which the candidate had to receive a rating of "high" by the panel in order to be considered "highly qualified" candidates and appear on the Certificate of Eligibles referred to the selecting official. Complainant received a "medium" rating on two critical elements: 1) A-2....proven ability to provide technical expertise and direction on complex issues and abatement plans and qualify as an expert witness on OSHA

related matters, and 2) A-3...ability to conduct safety and health investigations which are most difficult, technically complex and sensitive in nature.

The Complainant, was a safety specialist and program area leader at the OSHA Training Institute. He was found by the panel to have inadequately demonstrated the proven ability to provide direction on complex issues, qualify as an expert witness on OSHA related matters and conduct health invesitgations which are most difficult and technically complex and sensitive in nature. The complexity of Complainant's investigative experience were not stated in his application or performance reviews. This same deficiency existed in respect to his demonstration of the

ability to qualify as an expert witness or conduct difficult and complex health investigations. Complainant argues the panel should have "sumised" he possessed these qualities to a high degree based upon his reference to the Targeted Industry Program and their knowledge of his teaching responsibilities at the Institute. The panel was prohibited from relying upon personal knowledge abnout an applicant in assigning a rating. There is no evidence the panel applied this rule more rigidly with respect to Complainant than to other applicants.

Evidence supporting the panel's rating of the selectee, Josephine O'Brien, is clearly stated in her application and supporting documents presented to the review panel and

included in Volume IV of the investigative file at Tab E-5.

Panelists Joseph Camp and Jeff Spahn each had previous experience serving on a panel reviewing applicants for the position of Area Director. They were both Area Directors at the time of the rating and had extensive backgounds in both the safety and health programatic areas of OSHA. Each of these panelists noted in their testimony that the Complainant's application did not demonstrate the breath of knowledge and skills necessary to achieve a high rating in these two critical elements. The types of investigations which these panelists would have found to be of a highly complex nature are generally performed by persons minimally rated at

the GS-12 level. Complainant had referenced his performance evaluation as a GS-9 to support a high rating on each of the aforementioned elements. Mr. Spahn acknowledged the TIP (Targeted Industry Program) referenced by Complainant was orientated to the five most hazardous occupations but noted these industries were identified by SIC code and the reference to TIP inspections standing alone does not tell the rater whether the inspections were simple or complex. The complexity of a TIP inspection depends upon the individual work place and neither the narrative sections of Complainant's performance evaluation or his SF-171 demonstrated any investigations were of a sufficiently complex nature so as to justify a "high"

rating. Mr. Spahn also distinguished the weight to be given to proven ability to provide good theoretical instruction in a formal classroom setting versus proven competent performance in the field. (HT 503-508, 512-535, 5521-554; 560-569, 580; Volume IV, IE - E, E-2, E-4, E-5; AE - 2, 3, 6, 7, 8).

The Examiner finds the actions of the panel in rating the applicants for the Niles, Illinois, position are fully supported by the evidence. There is no credible basis upon which the Examiner can infer the actions of the Regional Administrator or panelists were tainted by a discriminatory motive or taken as a pretext to mask such discriminatory motives.

Volume V.

The issues addressed by the agency investigation and at hearing were:

Whether Complainant's Race (Black) and/or age (57)-Footnote 1 stating: "The Complainant withdrew his allegation of age discrimination prior to the hearing in regards to his noncertification for the position of Safety and Health Manager -Columbus, Ohio (GS-14). (HT pp. 5-7; 846)." - were factors in his noncertification for the position of Safety and Health Manager (GS-14), Columbus, Ohio Area Office, Region V, under Vacancy Announcement 79-238-OSHA? The investigation and hearing also addressed the issue of whether the

failure to certify and promote Complainant to the above position was the result of reprisals taken against Complainant by the agency due to previous participation in EEO complaint proceedings.

The panelists assigned Complainant an overall rating of "medium" in the critical elements addressing 1)...ability to conduct safety and health inspections which are most difficult, technically complex and sensitive in nature and in the element requiring 2) ...proven ability to effectively lead a group of subordinates, make assignments, schedule activities and monitor performance of activities. It would have been necessary the Complainant receive a rating of "high" on these elements in order to be

certified to the selecting official as "highly qualified".

Hershel Hensley testified he rated the applicants solely on the information contained in the application packet provided the panel. He did not find Complainant's SF-171 and performance evaluations reflected complex investigations of the type necessary to sustain a rating of "highly qualified". He found Complainant's administrative experience as an instructor was good but did not see the experience necessary to efficiently run an area office including hiring, evaluationof employees and allocation of office resources. The Complainant, Mr. Hale, was therefore assigned a rating of "medium" which he felt indicated Mr. Hale was knowledgeable

of the particular area. A rating of "highly qualified" in his estimation would have meant the individual was both knowledgeable and experienced enough to perform all duties as stated in the vacancy announcement. (HT 442-458, 561-470, 449-500).

Betty Lynt testified that she thought most panelists tended to rate the Complainant higher on some elements than was proper. She agreed, however, that a review of the application and supporting documents of the Complainant and the selectee showed the selectee to be better qualified. This conclusion was supported in part by the selectee's experience as a safety specialist GS-11/12 from January, 1972 through February, 1977 and his experience as a supervisory safety

specialist from February, 1977 through August, 1979. The selectee also acted for the area director in his absence during this period. The selectee was detailed to serve as area director from March, 1979 through May, 1979 in the Cleveland, Ohio office. (HT 1006-1013).

The evidence compiled during the agency investigation and at hearing does not support an inference of discriminatory conduct by the panel in failing to rate Complainant as "highly qualified" and certify him to the selecting official. There were clear differences in the types of experiences and levels of supervisory experience stated in the SF-171 and performance reviews of the Complainant and the selectee, James Vaughn. The Examiner

found no evidence Mr. Vaughan was allowed to illegally obtain qualifying experience which was denied the Complainant and the panel properly considered all experience cited by Mr. Vaughan in support of his application for the area director position.

Complainant has also attempted to demonstrate retaliation for his filing of EEO complaints and using the grievance and EEO process to protest allegedly discriminatory actions. Reprisal for opposing unlawful employment practices is prohibited by Section 704(a) of Title VII. To establish a prima facie case of retaliation Complainant must show: 1) he was engaged in or participating in a Title VII proceeding, 2) he received adverse treatment from the employer

contemporaneous with or subsequent to the opposition or participation, and 3) there is evidence of a causal connection between the participation in opposition to unlawful employment practices and the subsequent adverse action. Horchstadt v. worchester Foundation for Experimental Biology, 11 F.E.P. 1426, 1431 (D. Mass. 1976). Complainant must meet his burden by producing sufficient evidence upon which the Examiner may find disparate treatment occurred contemporaneously with the filing of EEO complaints or use of the grievance procedure to challenge allegedly discriminatory actions and, from which, the Examiner may infer a causal connection between the protected EEO activites and Complainant's failure to obtain the requested promotions.

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973).

Complainant has failed to establish a prima facie case of reprisal. The complaints currently being reviewed were filed in 1978, 1979 and 1980 due to noncertification or nonselection for a Safety Program Manager position and several Area Director positions. During the period of June, 1976 through March, 1983, Complainant was employed as a Program Area Leader (GS-13) at the OSHA Training Institute. This was a nonsupervisory position which provided course direction for training programs in safety. In March, 1983, Complainant was promoted to the position of Chief, Occupational Safety Training Branch (GM-14) at the OSHA Training Institute. At

the time of hearing, Complainant supervised a staff of 10 safety and health professionals, teaching a safety oriented curriculum. (HT 706-708).

I have previously found Complainant's noncertification and nonselection for the various positions to which he applied during the period 1978 through 1980 were not based upon any acts of discrimination by agency officials. Complainant has not alleged nor does the evidence show Complainant suffered any adverse personnel actions at the OSHA Training Institute due to his participation in EEO activities. There is no evidence Complainant applied for promotional opportunities at the OSHA Training Institute within his area of expertise to which he was not promoted.

The evidence in the investigative file and testimony of various witnesses at the hearing left no question Complainant is an eminently qualified instructor in his area of expertise. He had demonstrated extensive knowledge in the area of occupational safety and had proven himself an excellent communicator. The agency's actions in failing to certify Complainant as "highly qualified" for the area director's positions or select him as safety program manager for the Atlanta office were based upon an absence of demostrated experience in the areas of expertise required for those positions. The legitimate business reasons articulated by the agency for its actions coupled with Complainant's subsequent promotion to a supervisory level position

despite pending EEO complaints mitigates against any inference of discrimination in the agency's actions. The Examiner finds no basis upon which to infer the agency took or failed to take any personnel actions with respect to Complainant in reprisal for his having participated in EEO activities.

III. RECOMMENDED DECISION:

The Examiner recommends a finding of no discrimination against Complainant on the basis of Race (Black) or in Retaliation for having participated in prior EEO activites.

4/30/85

/s/Reuben Daniels
Complaints Examiner

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HENRY HALE,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	81 C 188
	)	
	)	
RAY MARSHALL, Secretary of Labor,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE THOMAS R. McMILLEN, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, April 19, 1982, at the hour of 11:00 o'clock a.m.

APPEARANCE:

HON. DAN K. WEBB
United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
BY: MR. JAMES KUBIK,

on behalf of the Defendant.

ALSO PRESENT:

MR. HENRY HALE

THE CLERK: 81 C 189, Henry Hale vs. Ray Marshall; status report.

MR. KUBIK: Good morning, your Honor. James Kubik for the federal defendant.

MR. HALE: Good morning, your Honor. I am the plaintiff. I am not here to represent myself but with the Court's permission I would like to explain why my two attorneys that are retained are not here.

THE COURT: Well, let's see what the defendant has to say.

MR. KUBIK: Your Honor, it was my understanding from talking with plaintiff's counsel on Friday that he had the intention to make a motion. I don't know if he was going to make it today or not, your Honor, be he said he was going

to make a motion to remand the case back to EEOC.

There was some question about whether or not the Appeals Council improvidently refused to hear the plaintiff's appeal of his class action suit. The plaintiff may have evidence to show that his appeal was timely filed. That was the issue there, your Honor. If that is true -- if he has such evidence and he wishes to make such a motion, the government would have no objection to such a motion.

THE COURT: How would the EEOC be able to determine that?

MR. KUBIK: There was a decision at the hearing level and then the plaintiff was notified of that decision and filed an appeal but it was denied for hearing

on the basis that it was filed too late. There is some question as to the exact time at which the plaintiff received the notice at the first stage of the administrative process.

THE COURT: You mean the EEOC might change its ruling?

MR. KUBIK: Yes, your Honor, if the plaintiff can show that the time when he -- or make some statement -- the basis of the decision by the Appeals Council was on the basis that there was no information in the record as to when the plaintiff had received the initial decision at the administrative level. So, there was a question as to whether or not the appeal was timely filed within the twenty days allowed. It is the plaintiff's position, as I am told by his

counsel, that the appeal was filed within the twenty-day period based on the date of receipt of the initial decision by the plaintiff. If that is true, then we would have no objection to any motion for remand. If that can be substantiated, then the Appeals Council would presumably hear appeals.

THE COURT: Is that what you want to do, Mr. Hale?

MR. HALE: Yes, sir.

THE COURT: The only problem is that the EEOC was dismissed on June the 8th, 1981. The only remaining defendant is Ray Marshall or his successor.

MR. KUBIK: What he wants to do is remand it for further administrative proceedings, that is, to give the plaintiff an opportunity to exhaust his

administrative remedies before coming back here before your Honor for a determination.

THE COURT: Will remanding it to Ray Marshall accomplish that, Ray Marshall or his successor?

MR. KUBIK: Yes, your Honor, because then it would go back for the Appeals Council.

THE COURT: Regardless of the fact that the EEOC is not a party?

MR. KUBIK: yes, your Honor, that is correct.

THE COURT: All right, I will grant the motion. We will remand it to the Secretary of Labor. That is what you want to do, Mr. Hale, right?

MR. HALE: No, sir, not to my understanding. That is the reason I

would like for the attorney to be here. We were to request to remand it back to EEOC for proper processing because they erroneously charged me with untimeliness.

THE COURT: That is the same thing. The government says that remanding it to the Secretary of Labor will accomplish that. So, that is what I will do.

MR. HALE: All right.

MR. KUBIK: Thank you, your Honor.

MR. HALE: Thank you, your Honor.

(Which were all the proceedings had and taken on the day and date aforesaid in the above-entitled cause.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HENRY HALE,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	81 C 188
	)	
	)	
RAY MARSHALL, Secretary of Labor,	)	
	)	
Defendant.	)	

CERTIFICATE

I, James W. Cheek, hereby certify the foregoing is a true,

accurate and complete transcript of the proceedings had in the above-entitled cause before the HONORABLE THOMAS R. McMILLEN, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on April 19, 1982.

/s/James W. Cheek
Official Court Reporter
United States District Court
Northern District of Illinois

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HENRY H. HALE, et. al.	)	
	)	
Plaintiff,	)	
v.	)	No. 85 C 6173
	)	
WILLIAM E. BROCK, Secretary of Labor	)	Judge Decker
	)	
Defendant.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

Plaintiff, HENRY H. HALE, by his attorneys, AFRED L. O'CONNOR, CLINCY M. LATIMER, JR., and MICHAEL HEUBERGER, hereby replies to Defendant's Motion to Dismiss, or in the alternative Motion For Summary Judgment as follows:

FACTS

On January 25, 1979 plaintiff filed an EEO complaint alleging that the defendant discriminated against him on the basis of his race (Bleck), when he as not certified for the GS-14 position of Area Director in Charleston, West Virginia on or about October 1, 1978 and that a less qualified white male was selected for the position.

On April 30, 1979 plaintiff filed an EEO complaint alleging that the defendant discriminated against him on the basis of his race (Black), when he was not selected for the GS-14 position of Safety and Program Manager in Atlanta, Georgia on or about January 22, 1979 and that a less qualified white male was selected for the position.

On July 15, 1979 plaintiff filed an EEO class complaint alleging that the defendant discriminated against the class on the basis of their race (Black), in professional categories in that defendant had (a) insufficient Blacks in all categories, (b) failed to promote qualified Blacks in all categories, (c) constructively discharged Blacks, (d) failed to hire Blacks, and (e) failed to adequately train Blacks; and that the defendant discriminated against him as an individual when he was not selected for the GS-14 position in Niles, Illinois on or about March 9, 1979 and that a less qualified white female was selected for the postion. The previous EEO complaints for Charleston, West Virginia and Atlanta, Georgia were combined with the

EEO class complaint by the defendant.

In September 1979 plaintiff filed an EEO complaint alleging that defendant discriminated against him on the basis of his race (Black), when defendant cancelled a Certificate of Eligibles dated June 6, 1979, listing plaintiff as one of three certified candidates for the GS-14 positions of Area Director in Cleveland, Ohio and Cincinnati, Ohio; and when he was subsequently not certified for the same positions on the new Certificate of Eligibles on or about August 17, 1979, and two less qualified white males were selected for the two positions.

On April 11, 1980 the Equal Employment Opportunity Commission's ("EEOC's") Complaints Examiner issued a

Statement of Findings & Recommended Decision, rejecting plaintiff's class complaint.

On June 18, 1980 the defendant issued its Final Decision where it adopted the EEOC's Statement of Findings & Recommended Decision and rejected plaintiff's class complaint. The letter informed the plaintiff that he could appeal the Agency Final Decision either to the EEOC's Office of Review and Appeals within 20 days of receipt of said decision or to the U.S. District Court within 30 days of receipt of said decision (Exhibit "A").

On July 14, 1980 plaintiff filed his appeal with the EEOC's Office of Review and Appeals (Exhibit "B").

On August 28, 1980 plaintiff filed

an EEO complaint alleging that defendant discriminated against him on the basis of his race (Black), when it failed to certify him for the GS-14 position of Area Director in Columbus, Ohio on or about March 22, 1980, and a less qualified white male was selected for the position. Plaintiff also alleged that defendant retaliated against him for participating in previous EEO activity.

On December 5, 1980 the EEOC's Office of Review and Appeals issued its Final Decision, rejecting plaintiff's appeal as not being filed timely (Exhibit "C"). The Final Decision was addressed to plaintiff at the Agency's office and was not received by plaintiff until December 16, 1980.

On January 14, 1981 plaintiff filed

a class action law suit in this Court entitled HENRY H. HALE v. RAYMOND MARCHALL, et. al., Case No. 81 C 188 (Exhibit "D"). On June 6, 1981, the EEOC was dismissed as a defendant to this suit.

On January 22, 1981 plaintiff filed a request with the EEOC Commision to reopen and reconsider the Final Decision of December 5, 1980. Plaintiff stated the following in said letter: "To prove how silly it was to establish some so-called 'five day presumption', the agency put the wrong zip code on my address. The correct zip code is 60047. The agency used 60041 which delayed the mailing. If the 'silent' aspects of the receipt matter would speak and the agency would locate its return receipt, it will

be noted that my wife signed for the decision on June 25, 1980."

"On page 1 of EEOC's decision, it is stated: 'On July 14, 1980, appellant initiated an appeal from the final agency decision..' Yet on page 2 of EEOC's decision it is stated: 'The record indicates, however, that the appellant's appeal was received or filed on July 18, 1980...' What kind of game is the Office of Review and Appeals playing? Certainly the Office of Review and Appeals is aware of the entire regulation they published in their decision; whereas, 'an appeal shall be deemed filed on the date it is postmarked...' See Appendix A for evidence of Postmark."

On May 4, 1981 the EEOC denied plaintiff's request to reopen and

reconsider the Final Decision of December 5, 1980. The EEOC Commission had forwarded plaintiff's request co their Office of Review and Appeals, and the same individual who wrote the December 5, 1980 decision also wrote the May 4, 1981 decision.

On April 19, 1982 at a Status Hearing before Judge McMillan the parties discussed the issue of plaintiff filing his appeal within the 20 day time period before the EEOC's Office of Review and Appeals. Judge McMillan issued a Minute Order remanding the cause of action to the Secretary of Labor (Exhibit "E"). As the Transcript of the Status Hearing indicates, the cause of action was remanded in order to give the plaintiff an opportunity to exhaust his

administrative remedies before coming back before this Court for a determination. The Secretary of Labor in turn was supposed to forward the cause of action back to the EEOC's Office of Review and Appeals (Exhibit "F"). Plaintiff's cause of action was never forwarded to the EEOC's Office of Review and Appeals pursuant to the court order.

On August 18, 1982 defendant informed plaintiff that his EEO complaints would be processed administratively by the Department of Labor as a class complaint (Exhibit "G").

On September 13, 1982 the U.S. Attorney's office forwarded a copy of Judge McMillen's Minute Order of April 19, 1982 to the EEOC and indicated that the order only applied to plaintiff as an

individual and not as a member of a class (Exhibit "G").

On October 18, 1982 plaintiff sent a letter to the agency in which he stated that he had given evidence of a July 14, 1982 postmark on his appeal to the EEOC's Office of Review and Appeals (Exhibit "I"). This evidence had been provided to the EEOC Commission on January 22, 1981 in his request for reconsideration of the December 5, 1980 decision by the EEOC's Office of Review and Appeals.

However, on December 1, 1982, the defendant stated that plaintiff's complaints would be processed as individual complaints rather than class complaints by the Department of Labor (Exhibit "J").

All of plaintiff's complaints were

combined in one action on an individual basis before the EEOC in Case Number 051-083-X0123. On January 24, 1984 the EEOC Complaints Examiner ruled that plaintiff's complaints would be processed as individual complaints rather than class complaints (Exhibit "K").

On April 20, 1984 the EEOC Complaints Examiner reiterated his ruling of January 24, 1984, that the complaints would be processed as individual rather than class complaint; and indicated that plaintiff had elected to proceed to the EEOC Hearing but was reserving the right to state objections to the failure of the Agency or the Examiner to review his allegations of discrimination in the context of class complaint (Exhibit "L"). The plaintiff agreed to proceed with the

EEOC Hearing as individual complaints rather than class complaints in order to avoid further delay and to preserve the record which goes back to 1978.

An EEOC Hearing was held on said individual complaints from September 24, 1984 through September 28, 1984 in Chicago, Illinois.

On April 30, 1985 the EEOC Complaints Examiner issued his Statement of Findings and Recommended Decision in Case Number 051-083-X0123 and he recommended a finding of no discrimination against defendant in all the complaints.

On June 4, 1985 defendant issued a Final Decision, where it adopted the EEOC's Statement of Findings and Recommended Decision and found no

discimination. Defendant informed plaintiff that if he disagreed with the agency's final decision he could file an appeal with the EEOC's Office of Review and Appeals within 20 days of receipt of said decision; or file and action in the U.S. District Court within 30 days of receipt of said decision (Exhibit "M"). The agency final decision was received by the plaintiff on June 6, 1985.

On July 8, 1985 plaintiff brought this action as a class action on plaintiff's behalf and on behalf of all Black Professional Workers (GS-5 through GS-15) employed by defendant from March 24, 1972 through the date of this complaint, who have been discriminated against in employment practices, including, but not limited to hire,

recruitment, classification, promotion, constructive discharge, training, and awards pursuant to Rule 23(a) and (b)(2). Plaintiff also brought an individual action on the basis of his individual EEO complaints as listed above.

ARGUMENT

A. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLASS COMPLAINT, SINCE PLAINTIFF FILED HIS APPEAL WITH THE EEOC'S OFFICE OF REVIEW AND APPEALS IN A TIMELY MANNER; AND THUS PROPERLY EXHAUSTED HIS ADMINISTRATIVE REMEDIES.

1. Plaintiff received the final agency decision on June 25, 1980.

When an employee receives a final agency decision under Title VII of the

Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq., he may file directly in the district court within 30 days, or he may opt to appeal the decision to the EEOC's Office of Review and Appeals within 20 days. See 29 C.F.R. 1613.233a.

The agency is required to transmit its Final Decision by a method which enables the agency to show the date of receipt of the Final Decision, pursuant to EEOC's Regulations (29 CFR 1613.221(b)(1) which states: "The decision of the agency shall be in writing, shall reflect the date of its issurance, and shall be transmitted to the complainant and his or her representative either by certified mail, return receipt requested, or by any other

method which enables the agency to show the date of receipt."

The EEOC contends that the agency is unable to establish when the plaintiff was in receipt of the decision and in such case the Final Agency Decision was deemed to have arrived 5 days following the date of the decision, i.e. on June 23, 1980. The agency did not transmit the Final Decision to the plaintiff pursuant to the regulation.

The Agency's Final Decision of June 18, 1980 contained the wrong zip code (60041 instead of 60047) and was not received by the plaintiff until June 25, 1980, as indicated in the affidavit of plaintiff's wife, which is attached hereto as Exhibit "N".

On January 22, 1981 the plaintiff

requested that the EEOC Commission reconsider the December 5, 1980 decision from the EEOC's Office of Review and Appeals; and informed the Commission that the agency used the wrong zip code and that his wife signed for the decision on June 25, 1980.

2. Plaintiff Filed His Appeal on July 14, 1980.

The EEOC's Regulation (29 CFR 1613.233(a) states: "...an appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark on the date it is received by the Commission..."

The appeal was sent on July 14, 1980 by certified mail -return receipt requested, and was received by the defendant on July 18, 1980. The attached

certified mail receipt verifies that the plaintiff's appeal was mailed, and thus postmarked on July 14, 1980 (Exhibit "O").

On January 22, 1981 the plaintiff also provided the EEOC Commission with same evidence that the appeal was postmarked on July 14, 1980.

THE DEFENDANT ADMITTED IN HIS ANSWER THAT THE PLAINTIFF FILED HIS APPEAL WITH THE EEOC'S OFFICE OF REVIEW AND APPEALS ON JULY 14, 1980.

3. Plaintiff's Appeal Was Filed Timely.

Even if it is assumed that the Agency Final Decision was deemed to have arrive on June 23, 1980, the appeal still was filed within the 20 day time limit on July 14, 1980 (since the 20th day fell on

July 13, 1980, a Sunday).

The Agency Final Decision was received by plaintiff on June 25, 1980 and his appeal was filed on July 14, 1980, i.e. within 19 days after receipt of the Agency Final Decision.

The plaintiff previously provided Frederick H. Branding, Assistant U.S. Attorney with evidence of the timeliness at a Status Hearing before this Court this year (Exhibit "P").

4. This Court Has Subject Matter Jurisdiction Over This Cause Of Action.

Plaintiff exhausted his administrative remedies in a timely manner before the Agency in 1980. Plaintiff has also properly exhausted his administrative remedies pursuant to the

Agency's Final Decision of June 4, 1985. This time plaintiff opted to go directly to district Court rather than make an futile and time consuming appeal to the EEOC's Office of Review and Appeals.

This Court has subject matter jurisdiction over this cause of action pursuant to the provisions of Brown v. General Services Administration, 425 U.S. 820 (1976).

B. PLAINTIFF'S PROPOSED CLASS SHOULD BE CERTIFIED.

1. Plaintiff Initiated This Action As A Class

ACTION.

As indicated above on July 15, 1979 plaintiff filled an EEO Class Complaint

of discrimination on the basis of race. The previous EEO Complaints of January 25, 1979 and April 30, 1979 were incorporated into the EEO Class Complaint. On June 18, 1980 the defendant issued its Final Decision and rejected plaintiff's class complaint. On July 14, 1980 plaintiff fied his appeal with the EEOC's Office of Review and Appeals. On December 5, 1980 the EEOC's Office of Review and Appeals rejected plaintiff's appeal as not being filed timely. In the previous section we have shown that plaintiff's appeal was filed timely with the EEOC's Office of Review and Appeals.

On January 14, 1981 plaintiff filed a class action law suit in this Court entitled HENRY H. HALE V. RAYMOND

MARSHALL, et al, Case No. 81 C 188. On April 19, 1982 Judge McMillen issued a Minute Order remanding the cause of action to the Secretary of Labor to be forwarded back to the EEOC's Office of Review and Appeals in order to give plaintiff an opportunity to exhaust his administrative remedies before returning to this Court.

The agency did not forward the cause of action back to the EEOC's Office of Review and Appeals. Instead the agency processed the cause of action as individual complaints rather than class complaints. Plaintiff objected to this but proceeded to the EEOC Hearing in September 1984 in order to preserve the record which goes back to 1978.

2. Scope Of Class Action.

In our complaint we brought this action as a class action on plaintiff's behalf and on behalf of all Black Professional Workers (GS-5 through GS-15) employed by defendant from March 24, 1972 through the date of this complaint, who have been discriminated against in employment practices, including, but not limited to hire, recruitment, classification, promotion, constructive discharge, training, and awards pursuant to Rule 23(a) and (b)(2).

Within the next 30 days plaintiff will: a. Initiate discovery to establish the class parameters of numerosity, commonality and typicality; b. seek leave to modify the class complaint - 1) to conform to the type of discrimination suffered by the plaintiff -2) to set the

temporal beginning date pursuant to Allen v. Isaac, 35 FEP Cases 1564 (ND Ill DC, 1983).

3. Motion to Certify Class.

After plaintiff has completed discovery on the class aspects of the case, plaintiff will file its Motion to Certify the Class.

C. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

For purposes of determining class certification, the allegations are taken as true and merits of the complaint are not examined. Eisen v. Carlise & Jacquelin, 417 U.S. 156, 9 FEP Cases 1302 (1974); Allen v. Isaac, 35 FEP Cases 1564, 1568 (ND Ill DC, 1983).

There are genuine disputed material issues of fact between the parties on

both the individual and class allegations, and as such Summary Judgment is not appropriate.

In Regner v. City of Chicago, 40 FEP Cases 1029 (7th Cir. 1986, this circuit established that because of the relative ease with which a prima facie case of employment discrimination may be made and the factual complexties inherent in Title VII litigation, summary judgment, although certainly available, is generally not favored in Title VII cases.

WHEREFORE, Plaintiff prays:

1. To deny Defendant's Motion to Dismiss
2. To deny Defendant's Motion For Summary Judgment
3. To allow Plaintiff to start Discovery on the Class action

4. To allow Plaintiff to amend his Class Complaint

Respectfully submitted,
/s/Clincy M. Latimer, Jr.
Attorney For Plaintiff

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Lake Zurich, Illinois 60047
(312) 438-6667

CERTIFICATE OF SERVICE

STATE OF ILLINOIS)
) S.S.
COUNTY OF LAKE)

I certify that I have this 23 day of June, 1986, served the parties in the action with the foregoing document by

personally serving a copy to the office of the attorney of record for each party at the following address:

Fred H. Branding
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604

/s/Clincy M. Latimer, Jr.
Attorney For Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HENRY H. HALE, et. al.	)	
	)	
Plaintiff,	)	
v.	)	No. 85 C 6173
	)	
WILLIAM E. BROCK, Secretary of Labor	)	Judge Decker
	)	
Defendant.	)	

AFFIDAVIT

ANNETTE F. HALE, being duly sworn, deposes and says:

1. That, I am the wife of the plaintiff in the above-cationed matter and that I make this affidavit in support of my husband's defense against the charge of untimeliness made by the Equal Employment Opportunity Commission's Office of Review and Appeals ("EEOC");

2. That, my husband and I currently

reside at 1011 Partridge Lane, Lake Zurich, Illinois 60047 and that we resided at the same address in June 1980;

3. That, on June 25, 1980, I signed for a registered Letter -return receipt requested from the U.S. Department of Labor ("Agency") which contained the Agency's Final Decision of my husband's EEO Class Complaint in a letter, dated June 18, 1980;

4. That, I signed for the letter because my husband was not at home and the letter was not stamped "addressee only";

5. That, I recall noticing at the time that the postmark indicated that the letter had been missent to two different towns before arriving at my home. Perhaps this was due to the incorrect

address,i.e., the zip code was listed as 60041 and it should have been written as 60047. One town stamped on the letter was Ingleside, Illinois 60041 and I do not recall the name of the other town;

6. That, I informed my husband of this problem; but he said there was no need for concern since the Agency had proof what we received the letter on June 25, 1980 and that he could file an appeal with the EEOC at any time up to 20 calendar days after receipt of this letter;

7. That, I later became aware that the EEOC was claiming that evidence of the actual date of receipt was lacking and that they had adopted a five day presumption of receipt of the Agency's Final Decision; which would deem the

letter to have been delivered on June 23, 1980, even though it was not received by me until June 25, 1980;

8. That, I originally prepared this affidavit on or about November 30, 1981 for Civil Action 81 C 188 before Judge McMillen.

/s/ANNETTE F. HALE

STATE OF ILLINOIS)
)
COUNTY OF LAKE)

I, /s/Juli Johnas, a notory public, do hereby certify that ANNETTE F. HALE, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that she signed said instrument as her free

and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal, this 23 day of June, 1986.

/s/Julia Johnas
NOTARY PUBLIC

My commission expires May 29, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HENRY H. HALE, et. al.	)	
	)	
Plaintiff,	)	
v.	)	No. 85 C 6173
	)	
WILLIAM E. BROCK, Secretary of Labor	)	Judge Decker
	)	
	)	
Defendant.	)	

STATE OF ILLINOIS	)	
	)	S.S.
COUNTY OF LAKE	)	

HENRY H. HALE, Plaintiff, being duly sworn deposes and says:

1. Now comes defendant with a filing of 242 pages in their motion to dismiss, or in alternative for summary judgment with 160 pages or 66% dealing with the merits (emphasis added) of the case in direct contradition of the U.S. Supreme Court's ruling in Eisen v. Carlisle &

Jacquelin, 9 FEP Cases 1309, May 28, 1974, stating, inter alia: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

Defendant knew this or should have known with reasonable diligence.

2. Once again, defendant levels the "red herring" charge of untimeliness. Their original charge of untimeliness in their December 19th filing on page 5 claiming I failed to appeal the decision of the Office of Review and Appeals. This appears no longer to be an issue. It should be noted that this unfounded untimeliness charge has fallen through

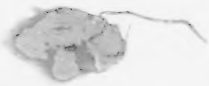
the cracks. The reason is that defendant's agent, Frederich H. Branding, asked me to give him the evidence to the contrary and I did so.

3. To show how grateful they were, defendant now comes forth with another (emphasis added) untimeliness charge that they had already relinguished their right to do so as illustrated by defendant's Exhibit, page 2, line 15-20, stating: "There was some question about whether or not the Appeals Council improvidently refused to hear the plaintiff's appeal of his class action suit. The plaintiff may have evidence to show that his appeal was timely filed. That was the issue there, your Honor. If that is true -if he has such evidence and he wishes to make such a motion, the government would have no

objection to such a motion."

4. Concerning defendant's motion to dismis or, in the alternative, for summary judgment, it should be noted that Rule 52 of the Federal Rules of Civil Procedure states, inter alia: "...in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, the judgment shall be entered pursuant to Rule 58..."

5. I am aware the Rule 12 (h)(3) states that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. However, it was established in pettway v. american Cast Iron Pipe



Co., 9 FEP Cases 756, Ct of Appeals, 5th Cir., May 22, 1969, stating, inter alia: "The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action."

6. It is my considered opinion that defendant is encouraged by their success in cases such as Beasley v. Donovan in defendant's Exhibit 9, where it was determined that plaintiff failed to establish a prima facie case notwithstanding that this circuit established in Regner v. Cityof Chicago, 40 FEP Cases 1029, May 1, 1986, stating, inter alia: "Because of the relative ease with which a prima facie case of employment discrimination may be made..."

7. Therefore, defendant's motion for

summary judgment is not on firm ground when viewed in light of Regner, supra, stating: "Because of the relative ease with which a prima facie case of employment discrimination may be made and the factual complexties inherent in Title VII litigation, summary judgment, although certainly available, is generally not favored in Title VII cases. See Logan v. General Fireproofing, 521 F.2d 881, 883, 3 FEP Cases 854 (4th Cir. 1971)("Ordinarily, summary dispostion of Title VII cases is not favored, especially on the basis of a potentially inadequate factual presentation."); Jones v. Western Geophsical Co., 669 F.2d 280, 283, 29 FEP Cases 1117 (5th Cir. 1982)(summary judgment should be "used cautiously" in Title VII cases)..."

8. In these in limine stages of this instant case, defendant would have this honorable court render a sua sponte dismissal which would not comport with the thoughts of Circuit Judge Cudahy in Doe v. St. Joseph's Hospital, 40 FEP Cases 823, April 2, 1986, stating, inter alia: "We cannot find a seventh circuit case in which a sua sponte dismissal without any notice and opportunity to be heard has been upheld."

9. It is my considered opinion that defendant makes too broad an interpretation of General Telephone Company v. Falcon, 457 U.S. 147, 101 S.Ct 2364, 28 FEP Cases 1744, June 24, 1981, considering that General involved a private company and it is not directly relevant to this case which involves the

federal sector under different statutes such as the Civil Service Reform Act of 1978, 5 USC 1111, stating, inter alia: "...each Executive agency conduct a continuing program for the recruitment of members of minorities for positions in the agency to carry out the policy set forth in subsection (b) in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service, with special efforts directed at recruiting in minority communities, in educational instutions, and from other sources from which minorities can be recruited..."

10. Therefore, I do not believe that this honorable court's views have been invalidated by General as expressed in

Minority Alliance Group v. Cook County, 28 FEP Cases 1304, December 23, 1976, stating, inter alia: "This court has previously discussed in some detail the reasons for its conclusions that a class action is appropriate to facilitate "across the board" attacks on discrimination, even where the discriminatory mechanisms utilized against the class representative are different from those employed against other members of the class. Porch v. Chrysler Credit Corp., No. 76 C 706 (N.D. Ill 8/4/76). Thus a class action may be brought by a representative who was discriminatorily discharged in behalf of those who were victims of a discriminatory refusal to hire."

11. It is also noteworthy to observe

the opinion of Senior District Judge Marovitz in Paskuly v. Marshall Field & Co., 25 FEP Cases 1133, June 18, 1980, stating, inter alia: "The policies underlying Title VII strongly favor the bringing of class actions. Bowe v. Colgate-Palmolive Co., 416 F.2d at 719; Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498, 1 FEP Cases 328, 68 LRRM 2782 (5th Cir. 1968). Title VII is primarily designed to eradicate discrimination of a class-wide character, and the Courts have recognized that this goal may often be best achieved by way of a class action. Bowe v. Colgate-Palmolive Co., 416 F.2d at 719. In this connection, Title VII is also designed to facilitate equal treatment among the class members. Romansanta v. United Airlines, Inc., 537

F.2d at 918. Therefore, the courts have adopted a rule which provides that once a single Title VII class member has timely filed charges with the EEOC, he may subsequently bring a class action without the other members of the class having instituted a grievance with the EEOC. Bowe v. Colgate-Palmolive Co., 416 F.2d at 720. Moreover, this Circuit had held that an EEOC filing by a single class member grants the adverse party sufficient notice of the possibility of a class action that the statute of limitation for the entire class is thereby tolled. Romansta v. United Airlinges, Inc., 537 F.2d at 918 n.6. The rationale for the rule is that when an individual lodges an EEOC claim which asserts a grievance common to the class

to which he belong, the adverse party can not fairly complain of surprise when a class action is subsequently instituted. Bowe v. Colgate-Palmolive Co., 416 F.2d at 720."

/s/Henry H. Hale
1011 Partridge Lane
Lake Zurich, Illinois 60047

312/438-5065

Sworn to before me on this
23rd day of June, 1986
/s/Janice H. Welen

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HENRY H. HALE, et. al.	)	
	)	
Plaintiff,	)	
v.	)	No. 85 C 6173
	)	
WILLIAM E. BROCK, Secretary of Labor	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Named plaintiff, Henry Hale, brings this Title VII action individually and on behalf of a class of black professional workers employed by the United States Department of Labor (Department), against defendant, William Brock, Secretary of Labor. Plaintiff, an employee in the Department's Occuptaional Safety and Health Administration (OSHA), alleges defendant violated 42 U.S.C. #2000e by engaging in racially discriminatory

hiring practices. Defendant moves to dismiss the complaint as untimely, or, in the alternative, for summary judgment on plaintiff's individual cause of action.Footnote 1 "The court may not grant summary judgment unless, looking only to the parties submissions of admissible evidence, it finds no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. See international Administrators, Inc. v. Life Insurance Co. of North America, 753 F.2d 1373, 1378 (7th Cir. 1985). end of footnote.

1. Factual Background

Plaintiff came to work for OSHA in 19071. From May, 1971 to July, 1973, he served as an OSHA compliance officer (GS-9, GS-11). He conducted Occupational

Safety and Health Act (Act) compliance inspections, but he did not have any supervisory responsibilities. Plaintiff advanced to Safety Specialist -Instructor (GS-12) at the OSHA Training Institute (Institute) in July, 1973. He taught employees OSHA compliance procedures, regulations, and standards. In June, 1976 plaintiff was promoted to a Program Area Leader (GS-13) at the Institute. In this non-supervisory position, plaintiff provided course direction for safety training programs.

In 1978 and 1979, plaintiff sought appointment to six vacant OSHA MANAGERIAL POSITIONS (GS-14). He applied for five Area Directorships --Charleston, West Virginia; Niles, Illinois; Cleveland, Cincinnati, and Columbus, Ohio -- and the

Safety Program Manager position in Atlanta, Georgia.

Under defendant's procedures, personnel staffing specialists initially screen GS-14 applications to determine which applicants are potentially eligible for the vacancy. The selected applicants are then submitted to a Merit Staffing Panel (panel). The panel is composed of experts in the relevant field and individuals skilled in evaluating the experience, education, and training of the applicants. See Defendant's Exhibit 7 at 6 (Df's Exh.). The panel rates each applicant under a series of standardized criteria to measure the applicant's aptitude and experience for the position. To be ceretified as eligible for these positions, an applicant must be rated

"highly qualified" by the panel.

Defendant did not select plaintiff for any of the six vacancies. The panels did not rate him "highly qualified" for any of the Area Director positions. See Df's Exh. 10A, 11A, 12A, 13A 15A. Defendant did rate plaintiff "highly qualified" to be a Safety Program Manager, but chose another highly qualified applicant for the job. Df's Exh.16A, 17, 17A.

In response, plaintiff filed individual and class complaints with the Equal Employment Opportunity Commission (EEOC) alleging defendant engaged in racially discriminatory hiring practices. Ultimately, plaintiff's complaints were combined into a single action before the EEOC. A hearing was held September 24-

28, 1984. On April 30,1985, the EEOC Complaints Examiner issued a recommended finding of no discrimination by defendant on all complaints. See Df's Exh. 7. Defendant adopted the EEOC's findings as the final agency decision on June 4, 1985. Plaintiff filed this lawsuit on June 8, 1985. Footnote 2 - "The plaintiff is entitled to a de novo consideration of the merits of his claims. However, the court is not required to ignore the careful and comprehensive analysis of the EEOC." End of footnote.

II. Timeliness of Ruling on Summary Judgment

Plaintiff contends the defendant's motion for summary judgment is premature. See Plaintiff's Exhibit (Pf's Exh.) P.

Generally, a court addresses the merits underlying a class action only after resolving a motion for certification. See Peritz v. Liberty loan Corp., 523 F.2d 349, 352-54 (7th Cir. 1975). This protects a potential class action-defendant by preventing a prospective class member from waiting for a resolution on the merits before opting in or out of the class. Id. at 353. However, in the instant case, defendant moves for summary judgment. He thereby voluntarily waives such protection. See e.g. Wright v. Schock, 742 F.2d 541, 543-45 (9th Cir. 1984); Ahne v. Allis-Chalmers Corp., 102 F.R.D. 147, 149-50 (E.D. Wisc. 1984).

Moreover, defendant's motion solely concerns the plaintiff's individual

claims. Potential class member will not be prejudiced by a decision on the merits. See Wright, 742 F.2d at 545. Rather, it is well settled that the named representative must be a member of the purported class. See e.g. Davis v. Ball Memorial Hosiptal Association, Inc., 753 F.2d 1410, 1420 (7th Cir. 1985). Thus, considerable time and expense will be saved should the court decide the named plaintiff's claim is without merit.

III. Plaintiff's Individual Claims

Summary judgment in a Title VII discrimination case must be approached cautiously. Regner v. City of Chicago, 789 F.2d 534, 536 (7th Cir. 1986). Rather, to survive a motion for summary judgment, plaintiff bears the burden of producing evidence that he did not

receive the promotions because of his race.

The Supreme Court has established a three part fram-work to assess a Title VII discrimination claim. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Footnote 3 - "Whether a plaintiff denied a managerial promotion should receive the inferences of discrimination afforded under McDonnell Douglas remains an open question. See Mason v. Continental Bank 704 F.2d 361, 365-66 (7th Cir. 1983). However, the court need not resolve that issue because defendant will not be prejudiced by using the McDonnell Douglas framework." End of footnote. First,

plaintiff must establish a prima facie case of discrimination by showing 1) he is a member of a protected minority; 2) he was qualified for the position; 3) despite his qualifications, he was rejected; and 4) his employer selected a non-minority member for the job. See Burdine, 450 U.S. at 252-54. Second, should plaintiff establish a prima facie case, the burden shifts to defendant to produce evidence of a legitmate, non-discriminatory reason for rejecting plaintiff's application. Id. at 253. Finally, if defendant articulates a non-discriminatory rationale, the presumption created in favor of plaintiff drops from the case. The burden shifts back to plaintiff who must demonstrate the employer's reason was merely a pretext

masking a discriminatory motive.

A. Area Director Positions

1. The Prima Facie Case

Defendant argues summary judgment is proper because plaintiff has not established he was qualified to serve as an Area Director. An Area Director must plan, direct, coordinate, and supervise all activities and employees in the area office to ensure proper implementation of the Act. See Df's Exh. 10. The director determines the seriousness of violations and renders final judgment on any citations and penalties imposed on employers. Id. The director also must work with employers to encourage voluntary compliance with the Act. Id.

To be eligible for the role of Area

Director, an applicant must receive a "high" rating by the panel in two area. First, the applicant must have denonstrated the technical ability to conduct complex investigations. Second, the applicant must have the managerial capability to supervise a staff of safety and health professionals. Footnote 4 - "Plaintiff does not contend defendant unnecessarily required a considerable showing of these skills." End of footnote. See e.g. Df's Exh. 18, 19, 20. In each case, the panel rated plaintiff no higher than "medium" in these two essential areas. Footnote 5 - "According to the EEOC decision, one panel initially gave plaintiff a "high" rating and certified him for the job. However, upon review, defendant determined the panel

misapplied the rating criteria to plaintiff and all other applicants. After a reevaluation by a new panel, plaintiff was not certified. The EEOC concluded the reevaluation was not discriminatory. See Df's Exh. 7. Plaintiff's brief did not raise this issue and the court is satisfied with the EEOC analysis." End of footnote. Consequently, he was not certified as eligible to be an Area Director.

The uncontroverted evidence is that plaintiff's primary experience was in a non-supervisory, classroom situation. Moreover, according to plaintiff's own qualifications statement, plaintiff had no practical experience with complex, on-site investigations. See Df's Exh. 14. Further, the record does not provide any

evidence that his inspector position or training role could have given him the necessary skills to conduct technically complex investigations. In addition, plaintiff has never managed a staff of safety professionals. In fact, plaintiff testified at the EEOC hearing that he was a bargaining unit employee from 1976-1980 and neither prepared performance evaluations of employees nor exercised a supervisory role over fellow employees. See Df's Exh. 7 at 16.

In sum, no genuine issue of material fact remains. Plaintiff did not have the minimum qualifications to be eligible to serve as an OSHA Area Director. Plaintiff has thus failed to established a prima facie case of discrimination. Footnote 6 - "Plaintiff's exhibit B

compares the number of blacks employed in professional positions in OSHA Region V with the total number of professional positions in that region before and after initiation of an affirmative action program. Statistical comparisons may in some cases establish a prima facie case of discrimination. However, plaintiff does not discuss this comparison in his brief. Moreover, the exhibit is insufficient to establish a prima facie case because it does not include the contextual relevance of the statistics. The court cannot meaningfully evaluate gross comparisons without knowing the size of the relevant labor markets, the total number of qualified applicants, the number of black applicants, or the number of non-black minorities selected."

End of footnote.

2. Defendant's Non-Discriminatory Reason

Assuming, arguendo, plaintiff has established a prima facie case of discrimination, defendant may move for summary judgment by rebutting plaintiff's case with evidence demonstrating a legitimate, non-discriminatory reason for the promotion decisions. See Patterson v. General Motors Corp., 631 F.2d 476, 482-3 (7th Cir. 1980), cert. denied, 451 U.S. 914 (1981). Defendant contends he rejected plaintiff's applications because in each instance he selected a candidate more qualified to be an Area Director than the plaintiff.

a) Charlestin, West Virginia

Defendant selected Stanley Elliott to be Area Director in Charleston, West Virginia. Unlike plaintiff, Elliott had several years of practical, management experience. See Df's Exh. 18. For two years Elliott supervised safety professionals in a variety of investigative tasks and assisted the Area Director in reviewing the work of subordinate professionals. Id. Indeed, at the time of the review process he was serving as Acting Area Director. Moreover, in his years as an industrial hygienist Elliott had planned and performed complex, on-site investigation.

b) Niles, Illinois

Defendant selected Josphine O'Brien to be Area Director in Niles,

Illinois. Unlike plaintiff, O'Brien had two years experience as Assistant Area Director in which she was directly responsible for supervising safety specialists and industrial hygienists. Df's Exh. 19d. Moreover, as a safety specialist, she conducted complex, on-site investigations assisting in the collection and analysis of data. Id.

c) Cincinnati, Ohio

The defendant selected William Murphy to be Area Director, Cincinnati, Ohio. Murphy, unlike plaintiff, had both supervisory and investigative experience. He supervised groups of compliance safety and health professionals and coordinated their inspections. Indeed, Murphy led a team of investigators in conducting a large scale investigation of a Texaco

refinery site. Moreover, Murphy had also served as an Acting Area Director. See Df's Exh. 20, 20A.

d) Cleveland, Ohio

Defendant chose Leslie Michaels for the Area Director position in Cleveland, Ohio. Df's Exh. 21. Michaels, a Ph.D in organic chemistry, had two years of OSHA investigative and supervisory experience coordinating the most complex industrial hygiene investigations. Id. In addition, Michaels worked for nine years in industrial hygiene research at the University of Cincinnati. Id.

e) Columbus, Ohio

Defendant chose James Vaughn to be Area Director in Columbus, Ohio. See Df's Exh. 22. Again, the defendant selected an applicant with considerable

management experience. Vaughn had served as Acting Area Director and had three years experience as a safety specialist supervising the work of eleven safety officers. Id. He also had on-site investigative experience.

Thus, the record demonstrates each of the selected applicants possessed the critical technical and management experience plaintiff lacked. Plaintiff's reply to defendant's motion for summary judgment has not questioned these facts nor produced any contradictory evidence. Plaintiff merely alleges genuine issues of material fact remain in dispute without presenting evidence for the court to evaluate. Further, plaintiff's brief does not raise the argument that the defendant's reason is merely a pretext.

Nor does a complete review of the evidence create a reasonable inference thereof.

Defendant has indisputably demonstrated a legitimate non-discriminatory reason for not selecting plaintiff. No genuine issue of material fact remains. Therfore, defendant's motion for summary judgment on plaintiff's individual, Area Director claims is granted.

B. Safety Program Manager

1. Prima Facie Case

In early 1979, plaintiff applied to be Safety Program Manager (GS-14) in Atlanta, Georgia. The job's principal work assignment is to serve as the Assistant Regional Administrator for Training, Education, Consultation, and

Federal Agency Programs. (ARA for Training) See Df's Exh. 16. The position requires the ability to plan and implement occupational safety and health education programs, as well as to provide consulting services to public and private employers. Id. To be selected, an applicant must have a general ability to perform managerial duties, as well as specialized experience which directly relates to the position's responsibilities. Id. The position does not demand either the on-site technical experience or the breadth of experience coordinating a staff of safety professionals required of an Area Director. Hence, in light of his training work at the Institute, plaintiff was "highly qualified" and eligible to be

considered for this position. Since defendant chose another eligible applicant, a white male, Alan McMillan, plaintiff has established a prima facie case of discrimination.

2. Legitimate Non-Disriminatory Reason

Defendant contends McMillan was selected instead of plaintiff because McMillan was more qualified for the position. Each had experience developing training programs, but McMillan had more experience particular to this position as he had served as the ARA for Trainign in Atlanta since 1975. See Df's Exh. 17A. Moreover, unlike plaintiff, McMillan had successfully fulfilled complex OSHA management and supervisory roles. He had successfully served for eight months as Acting Regional Administrator, a position

encompassing management of all aspects of an OSHA region. Id. In addition, as an OSHA special assistant, McMillan planned a reorganizational effort to bring all regional and area offices into uniform staffing design. Further, for three years McMillan was an OSHA Management Officer responsible for formulating and implementing a comprehensive regional management program involving 300 OSHA employees. In addition to extensive management experience, that role gave McMillan specialized experience in monitoring contracts and analyzing statistical data; both important for the Safety Program Manager's consulting responsibilities. See Df's Exh. 16. There is no evidence plaintiff had an comparable experience.

As with the Area Director positions, plaintiff did not question any of the facts outlined in the record or present evidence to the contrary. Moreover, plaintiff's brief does not raise the argument that this rationale is merely a pretext nor does a complete review of the evidence create an inference thereof. Thus, based on the record, no genuine issue of material fact remains. Defendant has indisputably demonstrated he selected McMillan because plaintiff lacked McMillan's management abilities and experience. Therefore, defendant's motion for summary judgment on plaintiff's individual, Safety Program Manager claim is granted.

IV. Conclusion

Therefore, defendant's motion for

summary judgment with respect to plaintiff's individual claims is granted. As no named representative remains, the class action is dismissed without prejudice to the puported class members. The court need not decide defendant's motion to dismiss the complaint as untimely and expresses no opinion on its merit.

ENTER:

/s/Bernard M. Decker
United States District Judge

DATED: October 16, 1986

IN THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH
CIRCUIT No. 85-3085

HENRY HALE, et. al. PLAINTIFF-APPELLANT

VS.

WILLIAM E. BROCK, DEFENDANT-APPELLEE
SECRETARY OF LABOR,
OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

HONORABLE BERNARD M. DECKER, SENIOR DISTRICT JUDGE

FRIEF FOR PLAINTIFF-APPELLANT

HENRY H. HALE, pro se

SUBMITTED: January 26, 1987

JURISDICTIONAL SUMMARY

Plaintiff, Henry H. Hale sued his employer, Occupational Safety and Health

Administration, for discriminating against him and others similarly situated, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A #2000e to 2000e-17.

STATEMENT OF THE ISSUES

The following issues are raised in this appeal: (1) whether the district court erred in failure to grant or deny class certification prior to a determination on the merits; (2) whether the district court erred in holding without a hearing that plaintiff's suit was not properly maintainable as a class action; (3) whether the district court erred in failure to grant plaintiff a de novo trial; (4) whether the district court erred in granting summary judgment

against plaintiff on several claims; (5) whether the district court erred in not permitting plaintiff the rights and procedures common to civil trials, such as discovery and opportunity for settlement; and (6) whether the district court erred in failure to resolve the untimeliness issue which was clearly a genuine issue in dispute, infra.

STATEMENT OF THE CASE

1. On January 25, 1979, plaintiff filed an EEO Complaint alleging that the defendant discriminated against him on the basis of his race (Black), when he was not certified for the GS-14 position of Area Director in Charleston, West Virginia on or about October 1, 1978 and that a less qualified white male was

selected for the position.

2. On April 30, 1979, plaintiff filed an EEO Complaint alleging that the defendant discriminated against him on the basis of his race (Black), when he was not selected for the GS-14 position of Safety and Program Manager in Atlanta, Georgia on or about January 22, 1979 and that a less qualified white male was selected for the position.

3. On July 15, 1979, plaintiff filed an EEO Class Complaint alleging that the defendant discriminated against the class on the basis of his race (Black), in professional categories in that defendant had (a) insufficient Blacks in all categories, (b) failed to promote qualified Blacks in all catgegories, (c) constructively discharged Blacks, (d)

failed to hire Blacks, and (e) failed to adequately train Blacks; and that defendant discriminated against him as an individual when he was not selected for the GS-14 position of Area Director in Niles, Illinois on or about March 9, 1979 and that a less qualified White female was selected for the position. The previous EEO complaints in paragraphs 1 and 2 herein were combined with the class complaint by the defendant.

4. In September 1979 plaintiff filed an EEO Complaintalleging that defendant discriminated against him on the basis of his race (Black), when defendant cancelled a Certificate of Eligibles dated June 6, 1979, listing plaintiff as one of three candidates for the GS-14 positions of Area Director in Cleveland,

Ohio; and when he was subsequently not certified for the same positions on the new Certificate of Eligibles on or about August 17, 1979, and two less qualified White males were selected for the two positions.

5. On April 11, 1980 the Equal Employment Opportunity Commission's ("EEOC") Complaints Examiner issued a Statement of Findings & Recommended Decision, rejecting plaintiff's class complaint, and the District Judge later used the same statements to reject plaintiff's suit without a trial (emphasis added).

6. On June 18, 1980, the defendant issued its Final Decision where it adopted the EEOC's Statement of Findings & Recommended Decision and rejected

plaintiff's class complaint.

7. On July 14, 1980, plaintiff timely filed his appeal with the EEOC's Office of Appeal and Review.

8. On August 28, 1980, plaintiff filed an EEO Complaint alleging that defendant discriminated against him on the basis of his race (Black), when it failed to certify him for the GS-14 position of Area Director in Columbus, Ohio on or about March 22, 1980, and a less qualified White male was selected for the position. Plaintiff also alleged that defendant retaliated against him for participating in previous EEO activity. This was not pursued to avoid possible harm to the Class Action.

9. Plaintiff became "chilled" by the defendant's actions and resolved not to

apply again for any Area Director position.

10. On December 5, 1980, the EEOC's Office of Appeal and Review issued its Final Decision, rejecting plaintiff's appeal as not being filed timely. The Final Decision was received by plaintiff on December 16, 1980.

11. On January 14, 1981, plaintiff filed a class action law suit in this Court entitled Henry Hale v. Raymond Marshall, et. al., Case No 81C-188.

12. On April 19, 1982, Henry Hale v. Raymond Marshall, et. al., Case No 81C-188 was remanded to the Secretary of Labor to forward to the EEOC's Office of Appeals and Review for further administrative processing. The complaint was never forwarded to the EEOC's Office

of Appeals and Review pursuant to the Court Order, and there was never any reprimand to defendant for ignoring the court order.

13. On August 18, 1982, defendant informed plaintiff that his complaints would be processed administratively bythe Department of Labor as a class complaint.

14. However, on December 12, 1982, defendant reversed himself and stated that plaintiff's complaints would be processed as individual complaints by the Department of Labor.

15. All of plaintiff's complaints were combined in one action before EEOC in Case Number 051-083-X0123 and a Hearing was held on said complaints on September 24, 1984 through September 28, 1984 in Chicago, Illinois with a

Complaints Examiner from Milwaukee, WI. (emphasis added).

16. On April 30, 1985, the EEOC Complaints Examiner issued his Statement of Findings and Recommended Decision in Case Number 051-083-X0123 and he recommended a finding of no discrimination against defendant in all the complaints.

17. On June 4, 1985, defendant issued its Final Decision, where it adopted the EEOC's Statement of Findings and Recommended Decision and found no discrimination. Plaintiff received this Final Decision on June 6, 1985.

18. Plaintiff has, in a timely manner, exhausted his administrative remedies, and brings this suit on his behalf and on the behalf of the class of

all others similarly situated to protect their rights as guaranteed by the Constitution and Laws of the United States of America.

19. On October 16, 1986, Judge Bernard Decker dismissed the class action and granted defendant's motion for summary judgment with respect to plaintiff's individual claims. Plaintiff respectively appeals.

SUMMARY OF ARGUMENT

This case was not ripe for decision for the following reasons: (1) case law in this circuit requires class certification decision prior to a determination on the merits (page 11); (2) plaintiff was not given a full and fair opportunity to maintain a class

action (page 12); (3) petitioner was not given a de novo trial (page 17); (4) summary judgment was premature (page 25); (5) plaintiff was not given a fair opportunity to develop his case (page 31); and (6) there was an issue of untimeliness to be resolved (page 33).

ARGUMENT

(1) WHETHER THE DISTRICT COURT ERRED IN FAILURE TO GRANT OR DENY CLASS CERTIFICATION PRIOR TO A DETERMINATION ON THE MERITS.

The trier of fact used Wright v. Schock, 742 F.2d 541d 543-45 (9th Cir. 1984) and Ahne v. Ahlis - Chalmers Corp. 102 F.R.D. 147, 149-5- (E.D. Wisc. 1984). to support his argument that a court is

not (emphasis added) required to address the class certification issue prior to a determination on the merits when a defendant moves for summary judgment as in this instant case.

Plaintiff deems neither Wright or Ahne to be controlling because in Wright "The district court held extensive discussions with the parties to determine the most fair and economical way to structure this complex litigation." This was not done in this instant case as noted by the Court Log at pages: ( ).

In addition, Wright Court held "A full and formal hearing on the motion for summary judgment." Plaintiff didn't receive this. Ahne states, Inter alia: "Discovery in this case proceeded with regularity..." "...Plaintiff here did

not (emphasis added by the writer) seek certification and in fact affirmatively sought resolution on the merits prior to certification..." Plaintiff, in this instant case, actively sought certification and discovery and was granted neither, infra.

To support his argument for not resolving a motion for class certification prior to dealing with the merits of the case, the trier of fact gives a very narrow view of Peritz v. Liberty Loan Corp, 523F.2d 349,352-54 (7th Cir. 1975). Peritz states, Inter alia: "... Rule 23 requires (emphasis added by the Seventh Circuit) class certification prior to a determination on the merits."

It is well settled that discovery in

a disparate impact case as here would be different than from the disparate treatment case the trier of fact resolved in this sua sponte ruling, infra.

The trier of fact used Regner v. City of Chicago, 789 F.2d 534, (7th cir. 1986) in this decision, and he must be aware that Regner also states, Inter alia: "Plaintiffs may pursue Title VII claims under either disparate treatment or a disparate impact analysis.

In general, either theory may be applicable to a particular set of facts. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 33 n.15, 14 FEP Cases 1514 (1977): Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 92, 29 FEP Cases 1682 (6th Cir. 1982).

Unlike a plaintiff in a disparate

treatment case, a plaintiff in a disparate impact case need not show an intent to discriminate. "To establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." Dothard v. Rawlinson, 433 U.S. 321, 329, 15 FEP Cases 10 (1977); Liberles v. County of Cook, 709 F.2d at 1132."

The Supreme Court should have settled this issue when it stated in Eisen v. Carlisle & Jacquelin. 9 FEP Cases 1309, May 28, 1979, inter alia: "In short, we agree with Judge Wisdom's conclusion in Miller v. Mackey International, 452 F.2d 424 (CA5 1971), where the court rejected a preliminary

inquiry into the merits of a proposed class action: In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met. Id., at 427."

In addition, the Supreme Court in United States Parole Commission v. Geraghty, 445 U.S. 388, 100 S. ct. 1202 63 L. Ed 2d 479 (1980) stated, inter alia: "A Plaintiff who brings a class action presents two separate issues for judicial resolution. One being the claim on the merits and the other being the claim that he is entitled to represent a class."

It was this noble purpose that

Justice Douglas had in mind n Eisen, supra, when he stated in dissent, inter alia: "I agree with Professor Chafee that a class action serves not only the convenience of the parties but also prompt, efficient judicial administration. I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are consumers whose claims may seem deminimis but who alone have no practical recourse for either remuneration or injuctive relief. Some may be environmentalists who have no photographic development plant about to

be ruined because of air pollution by radiation but who suffer perceptibly by smoke, noxious gases, or radiation. Or the unnamed individual may be only a ratepayer being excessively charged by a utility or a homeowner whose assessment is slowly rising beyond his ability to pay.

The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth."

Plaintiff has claimed from his very first complaint thatdefendant has used selection procedures which has an adverse

impact on the hiring, promotion, and other employment opportunities of his race and is considered to be discriminatory and inconsistent with guidelines exhibited in 29 CFR 1607 et. seq. The best method to correct this injustice is this certification.

Class certification would be a move towards bringing defendant in compliance with congressional intent in establishing Title VII. The Supreme Court in Griggs v. Duke Power Co., 3 FEP cases 177, March 8, 1971, stated inter alia: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of White

employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices."

Other circuits have agreed with the Seventh Circuit that justice requires certification prior to the ruling on the merits.

The Sixth Circuit in Shipp v. Memphis Area Office, 17 EPD # 8520, August 7, 1978, stated, inter alia:

"Pursuant to Rule 23(c)(1) a district judge is required to determine by order as soon as practicable after the commencement of an action whether an action commenced as a class action is to

be so maintained. This Circuit has held that a district judge has an obligation sua sponte to determine whether an action shall proceed as a class action. Senter v. General Motors Corp., supra; Garrett v. City of Hamtramck, 503 f.2d 1236 (6th Cir. 1974). In this case the district court never certified the class nor made any determination that the prerequisites for a class action were met, specifically, that plaintiff's claims were typical of the claims of the class pursuant to Rule 23(a). Nor did the district court make any determination that the action was properly maintainable as a class action pursuant to Rule 23(b)."

The trier of fact in this instant case used the case of Ahne, supra, to

support his decision and plaintiff thinks he should have used the conclusion of Ahne, stating, inter alia:

"In order to establish filing and briefing schedules on the parties' motions, to set revised discovery deadlines, if necessary, and to elicit advice from counsel regarding further proceedings in this case, the Court has scheduled a brief status conference for 8:30 A.M., on Thursday, May 24, 1984. As indicated, the parties should come prepared to discuss their expectations for the continued prosecution and defense of this matter."

In closing these remarks on class certification, Circuit Judge Swygert did it best and correctly in Peritz, supra, stating: "In the face of the Supreme

Court's concern in Eisen and in American Pipe with the problem of one-way intervention, and in the face of the clear language of Rule 23, we are constrained to hold that certification of the class was delayed beyond the permissible period allowed by the rule."

(2) WHETHER THE DISTRICT COURT ERRED IN HOLDING WITHOUT A HEARING THAT PLAINTIFF'S SUIT WAS NOT PROPERLY MAINTAINABLE AS A CLASS ACTION.

The U.S. Court Of Appeals Of The Fourth Circuit in Ardrofy vs. United Parcel Service, 4 FEP Cases 1955 August 18, 1986. stated, inter alia:

"A district court errs if it fails to evaluate carefully the legitimacy of the named plaintiff's plea that he is a

proper class representative under Rule 23(a). Id. at 160. See also Lilly v. Harris Teeter Supermarket, supra, 720 F. 2d at 333; Holsey b. Armour & Co., 743 F. 2d 199, 216, 35 FEP Cases 106 (4th Cir. 1984), cert. denied, 470 U.S. 1028, 105 S. Ct. 1395, 37 FEP Cases 192 (1985)."

In addition the Supreme Court Of The United States In General Tel. Co. v. Falcon, 28 FEP cases 174, June 14, 1982, stated, inter alia:

"Title VII class action, like any other class action, may be certified only if federal district court is satisfied, after rigorous analysis, that prerequisits of Rule 23(a) of Federal Rules of Civil Procedure have been

satisfied."

The key words in that court's decision for planitiff are "After rigorous analysis (emphasis added)." Nevertheless, the District Court in this instant case ignored plaintiff's prayer for class action and therefore do not comport with past decisions of this Honorable Court.

The General Tel. Co. Court also said: "The class action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. Califano v. Yamasaki, 442 U.S. 682, 700-701. Class relief is peculiarly appropriate when the issue involved are

common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class. Id., at 701. For in such cases, the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every (class member) to be litigated in an economical fashion under Rule 23. Ibid.".

In the very young years of Title VII the Seventh Circut Ruled on class action in a manner that served as a guide for other circuits. In Bowe v. Colgate-Palmolive Co., 2 FEP cases 121, September 26, 1969, this court stated, inter alia:

"Moreover, in an action brought

under Title VII, the charging party and suing plaintiff acts as a private attorney general who takes on the mantel of the sovereign. Jenkins v. United Gas Corp., 400 F.2d 28, 32, 1 FEP Cases 364, (5th Cir. 1968). See also Oatis v. Crown Zellerbach Corp., 389 F.2d 496, 1 FEP Cases 328, (5th Cir. 1968). When, as frequently happens, the alleged discrimination has been practiced on the plaintiff because he or she is a member of a class which is allegedly discriminated against, the trial court bears a special responsibility in the public interest to resolve the dispute by determining the facts regardless of the position of the individual plaintiff. Jenkins, supra at 33, n. 10 This is only fair to the defendant as it avoids

forcing him to defend a multiplicity of actions. . . .

"A suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion or national orign. In our view, it is indistinguishable on this point from actions under Title II relating to discrimination in public accomodations. In Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-02 (1968), the court held that since vindication of the public interest is dependent upon private suits, the suits are private in form only and a plaintiff who obtains an injunction does so as a private attorney general vindicating a policy that Congress

considered of the highest priority. Oatis v. Crown Zellerbach Corp., supra, and Jenkins v. United Gas Corporation, supra, hold similarly as to Titel VII actions regarding racial discrimination. We agree with the Fifth Circuit and perceive no reason under the law or the cases why the same should not be true to Title VII actions against sex discrimination. See also Quarles v. Phillip Morris, Inc., 271 F. Supp. 842, FEP Cases 179 (D.Va.1976)."

In addition, the Bowe court Stated: "We agree with the holding in Oatis, supra, that:

. . It would be wasteful, if not vain for numerous employees, all with the same

grievance, to have to process many identical complaints with the EEOC. . . The better approach would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated . . ."

The views of this Circuit are the same as plaintiff's as stated in Ekanem v. Health & Hosp. Corp., 33 FEP Cases 1503, December 14, 1983 stating, inter alia: "Plaintiff's class claims were based upon the "Pattern or Practice Theory of Employment Discrimination described in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 14 FEP Cases 1514 (1977). Under that theory, plaintiffs have to demonstrate

that the alleged discriminatory practices reflected 'standard operating procedure - the regular rather than the unusual practice.' Id. at 336."

In addition, in Ekanem this court also stated: "We note that the district court has not passed on plaintiff's request for class certification, pursuant to Fed. R. Civ. P. 23."

It is the opinion of plaintiff that he could have met the requirements of Teamsters regarding Rule 23 if he had been given a full and fair opportunity to do so. Plaintiff contends that the district court based its decision on erroneous legal principles as well as any erroneous view of the facts, infra.

In closing this section, plaintiff begs the court's indulgence in sharing

the thoughts of the U.S. Court of Appeals, District of Columbia Circuit, in Cook v. Boorstin, 37 FEP Cases 1777, June 7, 1985, stating, inter alia: "Title VII embodies a profound national commitment to end the scourge of racism and sexism in our country's workplaces. If our nation is to move with speed toward genuine equality of opportunity, employers, including federal agencies, cannot be allowed to escape the requirements of Title VII by a litigation strategy of divide and conquer. 'Careful attention' to the Federal Rules of Civil Procedure of course remains 'indispensible,' Falcon. 457 U.S. at 157; Rodriguez, 431 U.S. at 405-06, but those rules, it should be remembered, are to be 'construed to secure the just, speedy,

and inexpensive determination of every action,' Fed. R. Civ. P.1.

We recognize and are sympathetic to the burdens placed on trial judges by cases involving multiple parties and multiple lawyers. It is fine for commentators and appellate courts to speak of the systemic efficiency of trying one lawsuit in lieu of many, but a multi-party action obviously does little in the short run to alleviate the workload of the individual trial judge to whom it is assigned. Instead, the trial judge faces only the demands of managing a complex proceeding, maintaining order among many litigants, and assembling a coherent record out of a jumble of pleadings, testimony and evidentiary exhibits. We recognize also that the

burdens placed on the trial judge can rise geometrically with the number of parties and claims. Nevertheless, the judicial system as a whole benefits substantially when similar complaints are resolved in a single unified proceeding, and the advantages in terms of efficiency and uniformity are simply too great to ignore. In the case before us, we need not strike the balance between these disparate concerns; the balance has already been struck by statute, rule and precedent."

(3) WHETHER THE DISTRICT COURT ERRED IN FAILURE TO GRANT PLAINTIFF A DE NOVO TRIAL.

The trier of fact stated in his

adverse decision that "the plaintiff is entitled to a de novo consideration of the merits of his claims. However, the court is not required to ignore the careful and comprehensive analysis of the EEOC."

It is unbelievable that a Senior District Judge would make such a statement in this day and age. Over a decade ago, this Court spoke on the de novo issue before the Supreme Court did in Chandler v. Roudebush, 425 U.S. 840,12 FEP Cases 1368, (1976).

The Seventh Circuit in Caro v. Shultz, 11 FEP Cases 327, September 3, 1975, stated, inter alia: "U.S. Government employee bringing action under Section 717 of Civil Rights Act of 1964 following exhaustion of administrative

remedies is entitled to trial de novo. (1) Under Section 717(d). provisions of Section 706 (f) through (k) of Act, which U.S. Supreme Court decided in Alexander v. Gardner-Denver Co. (7 FEP Cases 81) provide for trial de novo in private Title VII actions, govern Title VII actions by U.S. Government employees 'as applicable,' and these words do not limit de novo review; (2) legislative history reveals that Congress intended U.S. Government employees to have as full a panoply of procedural remedies as those afforded private sector litigants....

In the present case, the plaintiff is entitled to pursue discovery and to supply appropriate materials in opposition to the Government's motion for summary judgment. If the existence of

any genuine issue of fact as to any employment discrimination then remains, the case must proceed to trial. As held in Sperling, 'If (summary judgment) is not granted, the agency record is admissible in evidence at trial when appropriate under the applicable Federal Rules of Civil Procedure and of Evidence. And, as in any other civil action, the aggrieved federal employee must prove his or her discriminatin claim by a preponderance of the evidence.' 515 F.2d at 484, 10 FEP Cases at 669.

Without passing on the merits of her claim, it appears from the record that plaintiff may be able to oppose summary judgment successfully. In that event, she will be entitled to a full trial before the district court and an independent

decision on her claims.

Reversed and remanded for further proceedings consistent herewith."

In addition, the District Court in the Eastern District of Wisconsin in Bashaw v. Dept. of Treasury, 29 FEP Cases 1232, April 11, 1979, stated, inter alia: "In Chandler v. Roudebush, Supra, the Court held that federal employees proceeding in federal court under 42 U.S.C. 2000e-16 have a right to a trial de novo of their claims of discrimination. Thus, under Chandler, this court is required to do more than merely review the previous administrative determinations of the plaintiff's claims.

Chandler does not necessarily preclude the use of summary judgment to dispose of claims brought under 2000e-

16. Mahroom v. Hook, 563 F.2d 1369, 1376, 16 FEPO Cases 130 (9th Cir. 1977). Nor does that case preclude this court from basing its resolution of this case on the administrative record if the parties were to stipulate that they have no evidence to add to that record. (This was not the situation in this instant case)....

Under Rule 56, Federal Rules of Civil Procedure, summary judgment is only proper where there are no material facts in dispute and the movant is entitled to judgment as a matter of law. Specifically with regard to claims brought under 42 U.S.C. 2000e-16, the court of appeals for this circuit has stated '(i)f the existence of any genuine issue of fact as to any employment

discrimination then remains, the case must proceed to trial.' Caro v. Schultz, 521 F.2d 1084, 1089, 11 FEP Cases 327 (7th Cir. 1975). In Staren v. American National Bank and Trust Co., 529 F.2dg 1257, 1261-62 (7th Cir. 1976), the court also noted with regard to summary judgment: 'In summary judgment procedure the trial court should not weigh the evidence of the plaintiffs against that of the defendants. That is the function of the fact finder at trial (emphasis added by the court).

'Cases in which the underlying issue is one of motivation, intent, or some other subjective fact are particularly inappropriate for summary judgment....'

While many of the facts underlying each of the party's claims are

undisputed, the ultimate factual question of the motivation for the decisions is clearly in dispute and should be resolved at trial."

This case proves that there exists a Federal Judge who can speak of the "careful and comprehensive analysis of the EEOC." EEOC should frame the remark with due credit of Bernard M. Decker, Senior United States District Judge. It is the considered opinion of plaintiff that EEOC would not get many federal judges to support that opinion. It was only a few years ago that Fred W. Alvarez, Commissioner, EEOC, was stating in the media how surprised he was at the anti-charging bias that EEOC has. When he was in the private sector representing defendants, he thought it was his legal

skills that made him so successful until the definite tilt towards defendants by EEOC was observed by him.

The Sixth Circuit in Williams v. Tennessee Valley Authority, 13 EPD #11,597, March 28, 1977, stated, inter alia:

"Dissatisfaction with complaint procedures of the CSC (now EEOC) prior to 1972 and uncertainty about the requirement of exhaustion of administrative remedies were among the factors leading Congress to make judicial relief available to federal employees under Title VII. The House Report made these comments concerning CSC procedures prior to 1972.

A critical defect of the Federal equal employment program has been the

failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment. The defect, which existed under the old complaint procedure, was not corrected by the new complaint process. The new procedure, intended to provide for the informal resolution complaints, has, in practice, denied employees adequate opportunity for impartial investigation and resolution of complaints.

Under the revised procedure, effective July 1, 1969, the agency is still responsible for investigating and judging itself. Although the procedure provides for the appointment of a hearing examiner from an outside agency, the examiner does not have the authority to

conduct an independent investigation. Further, the conclusions and findings of the examiner are in the nature of recommendations to the agency head who makes the final agency determination as to whether discrimination exists. Although the complaint procedure provides for an appeal to the Board of Appeals and Review in the Civil Service Commission, the record shows that the Board rarely reverses the agency decision.

The system which permits the Civil Service Commission to sit in judgment over its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built-in conflict of interest.

Testimony reflected a general lack of confidence in the effectiveness of the

complaint procedure on the part of federal employees. Complainants were skeptical of the Civil Service Commission's record in obtaining just resolutions of complaints and adequate remedies. This has discouraged persons from filing complaints with the Commission for fear that it will only result in antagonizing their supervisors and impairing any hope of future advancement."

In this instant case, class action processing was unsuccessful by plaintiff with EEOC and when he asked a National Official, Jody Marten, staff member of Public Sector Programs, why this was so. He was told that complaints examiner's production is measured by the number of cases they process, and therefore, no one

in his right mind would do anything but reject class complaints.

In addition, plaintiff's appeal of the rejection didn't make him any friends in the Chicago EEOC Office. When the case returned to Chicago, it was shipped to the Milwaukee District Office whose jurisdiction consists of states of Wisconsin, Minnesota, and Iowa; therefore, so much for the "careful and comprehensive analysis of the EEOC."

In addition, the Fourth Circuit in Warren v. Halstead Industries, 41 FEP Cases 1665, October 2, 1986, stated, inter alia: "Rarely will there be "eyewitness" testimony with regard to the employer's mental processes. Aikens 460 U.S. at 716. Rather, several types of objective evidence may be potentially

probative of pretext. For instance, in the promotion context, a plaintiff may attempt to produce evidence that the defendant departed from its usual business procedure, or that the procedures by which a decision was made are suspect; plaintiffs might also point to evidence that there are no fixed or reasonably objective standards and procedures for evaluating the applicant. Love v. Alabama Institute for Deaf and Blind, 613 F. Supp. 436, 438, 41 FEP Cases 1655 (N.D. Ala. 1984).

Evidence of a general atmosphere of discrimination may also be considered: proof of historically-limiting opportunity or harassment. Even where such past discriminatory acts are time-barred for purposes of a particular

claim, the Supreme Court has stated that this type of showing 'may constitute relevant background evidence in a proceeding in which the status of a current prctice is at issue.' Holsey v. Armour & Co., 743 F.2d 199, 207-08,35 FEP Cases 1064 (4th Cir. 1984), cert. denied, 470 U.S. 1028, 105 S. Ct. 1295,37 FEP Cases 192 (1985), citing United Airlines, Inc. v. Evans. 432 U.S. 553, 558, 14 FEP Cases 1510 (1977). In addition, evidence of a general atmosphere of discrimination may be considered with other evidence bearing on motive in deciding whether a plaintiff has met his burden of showing that the defendant's articulated reasons are pretextual. Id.; see also Furnco, 438 U.S. at 580; Sweeney v. Board of Trustees of Keene State College, 604 F.2d

106, 112-13, 20 FEP Cases 759 (1st Cir. 1979). Thus, evidence of racial harassment or threats, though not the subject of a distinct claim, is relevant to the determinations of intent and pretext.

(2) Finally, statistical proof may be a tel-tale sign of pretext even if it is not dispositive of the claim in and of itself. Richmond, Fredericksburg & Potomac RR, 593 F. Supp. at 280. Statistics with regard to the defendant's employment policy and practice may be helpful to a determination whether its action in a particular case conformed to a general pattern of discrimination. McDonnell Douglas, 411 U.S. at 805. Although statistics cannot alone prove the existence of a pattern or practice of

discrimination, or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures, '(s)tatistical analysis served and will continue to serve an important role' in cases in which the existence of discrimination is disputed. Teamsters v. United States, 431 U.S. 324,339, 24 FEP Cases 1514 (1977) citing Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1974)."

The District Court in the middle district of Tennesse in Williams v. Tennessee Valley Authority, 13 FEP Cases 1794, 10 EPD #10,531, November 21, 1975, stated, inter alia:

In granting a trial de novo, the court is influenced by the fact that the

hearing conducted on July 31, 1974, by the Civil Service Complaints Examiner, though apparently fair on its face, allegedly lacked some of the fundamental elements necessary to a full and impartial adjudication of plaintiff's complaint, which must be taken as true in ruling on a motion for summary judgment, no pre-trial discovery of any consequence was taken, plaintiff was not able to present all the evidence that he desired, the record is incomplete, and the complaints examiner frequently went off the record without plaintiff's consent. Another factor which cannot be ignored is that the ultimate determination of plaintiff's grievance was made by an official whose impartiality is certainly subject to some question."

The District of Columbia Circuit in Hackley v. Roudebush, 10 EPD #10,403, September 29, 1975, stated in footnote 57, inter alia: ".... A court is a more appropriate forum in which to resolve Civil Rights questions, in title VII Cases ...., since it provides procedural safeguards Federal Judges enjoy tremendous respect, the forum is convenient for the litigants and the judge is impartial, the proceedings are public, and the judge can fashion a complete remedy, the Federal Rules of Civil procedure with respect to discovery, greatly facilitate collection of evidence for trial; hearing examiners (now complaints examiners) tend to be inadequate fact-finders; administrative tribunals are less impartial, legal

arguments are not always effectively brought forth, and procedural rules are virtually nonexistent; administrative tribunals are too sensitive to political winds (emphasis added by writer) rather than stare decisis, while courts possess not only greater independence, but also greater expertise, and judicial precedents encourage out-of-court settlements."

Therefore, plaintiff has a right to a de novo trial as this court and the Supreme Court promised.

(4) WHETHER THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST PLAINTIFF ON SEVERAL CLAIMS.

The trier of fact in support of his decision to grant defendant's motion for summary judgment stated "considerable

time and expense will be saved should the court decide the named plaintiff's claim is without merit." The Supreme Court of the United States in Alexander v. Gardner - Denver Co., 7 FEP Cases 90, February 19, 1974, stated, inter alia: "It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of title VII Rights." Therefore, so much for the cost factor.

This issue is addressed by the Tenth Circuit in Hansbury v. Regents, 19 FEP Cases 806. April 19, 1979, stating, inter alia:

Footnote 13. "We note that a motion for summary judgment on the merits would have been premature and if made, prematurely, considered, until such time

as plaintiff had had ample opportunity to conduct meaningful discovery relating to her substantive claim (emphasis added by the writer) see Perry v. Sinderman, 408 U.S. 593, 598, (1972). The reason for this is clear. As in any discrimination case, evidence bearing on discrimination employment practices committed by defendants is largely in the hands of the defendants themselves. Only through adequate discovery will this evidence become available to plaintiff." The thoughts of the Tenth Circuit makes sense to plaintiff.

The trier of facts in granting summary judgment claimed plaintiff's applications in all eight (not six as claimed by the trier of facts) instances were rejected because in each instance

defendant selected a candidate more qualified to be an Area Director than the plaintiff.

The District Court made an erroneous conclusion of law if one gives a fair reading to the conclusion of the District of Columbia Circuit in Aikens v. U.S. Postal Service Board of Governors, 23 EPD #31, 144, 23 FEP Cases 2245, July 31, 1980, stating, inter alia:

Even if we were to find that the evidence with respect to Aikens' qualifications was unclear, we would still be required to reverse and remand this case because of certain erroneous conclusions of law in the opinion of the District Court.

In conclusion of law number 8, the District Court opinion indicates that

plaintiff's claim cannot succeed because he "failed to prove that he was as qualified or more qualified than the individuals who were promoted or detailed" (emphasis added). Plainly, this is a misstatement of applicable law and counsel for appellee conceded as much during the oral arguments in this case on appeal. As noted above, the Supreme Court in McDonnell Douglas, supra, has made it clear that, in order to make out a prima facie case with respect to the qualification element, an individual complainant in a Title VII suit need only prove that he or she "was qualified for a job for which the employer was seeking applicants." 411 U.S. at 802. Nothing in McDonnell Douglas, supra, requires a plaintiff seeking to make out a prima

facie case to prove that he was the most qualified person for the promotion in question. See, e.g., Rich v. Martin Marietta Corp., 552 F.2d 333,347(10th Cir. 1975).

We know of no authority, and the District Court opinion cites none, to support the proposition that plaintiff was required to prove that "he was as qualified or more qualified than individuals who were promoted." Such a proposition is plainly at odds with the test enunciated in McDonnell Douglas, supra. Therefore, we must find that the District Court misapplied the law under Title VII when it imposed such an onerous burden with respect to the proof required of plaintiff in order to make out a prima facie case.

District Judge Warren in Collin v. Williams Steel & Supply co., Eastern District of Wisconsin, April 8, 1985, 37 FEP Cases 1015, states, inter alia: "... The Court does not mean to impose upon the plaintiff any present obligation to argue his entire case, including the establishment of prima facie and rebuttal evidence, within the framework of a request for summary judgment." Yet in this instant case, this is what the District Court is expecting of plaintiff.

The District Court in the District of Columbia in Griffiths v. Sheldon, 14 EPD #7513, March 29, 1977, stated, inter alia:

The court finds that this aspect of the case still presents genuine issues of material fact. In Hackley v. Roudebush

the Court of Appeals for this Circuit recognized the difficulty of resolving questions concerning promotions to high level positions:

(I)n many promotional situations-particularly at higher GS levels where the ultimate decision is committed to managerial discretion with few or no objective criteria--the crucial factual issue of whether the supervisor's actual motives had racial overtones will be material, and if disputed will preclude grant of summary judgment; instead, the District Judge would have to hear testimony to enable him to evaluate the credibility of the supervisors involved." 520 F.2d at 157. For these reasons, the defendants' motion for summary judgment is denied at this time."

The District Court in the Western District of Michigan in Weisboro v. Michigan State Univ., 25 FEP Cases 1588, August 29, 1980, stated, inter alia:

"The Sixth Circuit has made it clear that dismissals of civil rights claims will be scrutinized with special care. Westlake v. Lucas, 537 F.2d 857,858 (6th Cir. 1976). In this regard the District Courts have been given a clear directive that "(a) case brought under the Civil Rights Act should not be dismissed at the pleading stage unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim," Lucarell v. McNair, 453 F.2d 836,838 (6th Cir. 1972)."

This court rulled in Stumph v.

Thomas & Skinner, Inc., 38 FEP Cases 1114, August 9, 1985, stating, inter alia:

"Summary judgment is proper only when there is no genuine issue as to any material fact ... the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In determining whether an issue of material fact exists, the court must construe the facts alleged in the light most favorable to the party opposing the motion for summary judgment. Janowiak v. City of South Bend, 750 F.2d 557,559, 36 FEP Cases 737 (7th Cir. 1984) in Kephart we noted that summary judgment is improper in a discrimination case where a material issue involves any weighing of conflicting indications of motive and intent. 630 F.2d 1218. Accord

White Motor Co. v. United States, 372 U.S. 253, 259 (1963) (summary judgment inappropriate "where motive and intent play leading roles"); Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180, 185 (8th Cir. 1976) ('(s)ummary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles').

(2) We believe that the trial court impermissably weighed conflicting evidence in this case and improperly made findings of fact which were not in the light most favorable to plaintiff."

This court continued to speak to the summary judgment in Mason v. Continental IL. Nat'l. Bank, 704 F.2d 361 (1983),

stating, inter alia:

"Whether plaintiff was really qualified for position to which she sought advancement was question of fact not to be decided on summary judgment in equal employment opportunity case. Civil Rights Act of 1964, 701 et seq., 42 U.S.C.A. 20003 et seq.; 42 U.S.C.A. 1981....

Cases turning upon subjective considerations of motive and intent are not ordinarily appropriate for decision upon summary judgment. See, e.g., Baldini v. Local 1095, UAW, 581 F.2d 145, 151 (7th Cir. 1978). And plaintiffs should not be deprived by summary judgment of a "full and fair opportunity to demonstrate pretext." Rowe v. Cleveland Pneumatic Co., Numerical

Control, Inc., 690 F.2d 88, 97 (6th Cir. 1982); see also Davis v. Weidner, 596 F.2d at 732, quoting McDonnell Douglas, 411 U.S. at 805,93 S.Ct. at 1825-1826."

Another case from this circuit that is relevant is Powers v. Dole, 782 F.2d 689 (7th Cir. 1986), stating, inter alia:

"In Title VII cases, we approach the application of these principles with a special caution. Summary judgment is infrequently an appropriate resolution. McKenzie v. Sawyer, 684 F.2d 62, 67 (D.C. Cir. 1982). The factual issues presented in such litigation, including the issue of discriminatory intent which is often proven by circumstantial evidence, cf. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S.252, 97 S.Ct. 555, 50 L. Ed.2d 450 (1977), cannot often

be resolved on summary judgment."

Plaintiff shares the views of Senior Circuit Judge Swygert speaking in Box v. A & P Tea Co., stating, inter alia:

"Finally, I wish to voice my concern about two separate aspects of this case. First, I deplore the increasing use of summary judgment when the posture of the case calls for a trial. Pressures allegedly caused by heavy caseloads ought not be the excuse for violating both the spirit and the literal terms of Fed. R. Civ. p. 56.

Second, it is with regret that I am constrained to say that the disposition of this case seems to reflect a recent trend in the federal courts to blunt the salutary purpose of Title VII of the Civil Rights Acts of 1964. That purpose

was clearly stated by Chief Justice Burger in Griggs v. Duke Power Co., 401 U.S. 424,431, 3 FEP Cases 175 (1970).

Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed. What is required by Congress in the removal of artificial arbitrary, and unnecessary barriers to employment when the barriers operate indeviously to discriminate on the basis of racial or other impermissible classification. Sex and race discrimination with respect to employment opportunities and promotions should be eliminated "root and branch," cf. Green v. County School Board, 391 U.S. 430, 438 (1967), and not be left to fester and poison the ideal of equal justice for all segments of our society."

For the reasons given above, the District Court erred in granting summary judgment against plaintiff on his (eight) claims.

(5) WHETHER THE DISTRICT COURT ERRED IN NOT PERMITTING PLAINTIFF THE RIGHTS AND PROCEDURES COMMON TO CIVIL TRIALS, SUCH AS DISCOVERY AND AN OPPORTUNITY FOR SETTLEMENT.

On June 23, 1986, plaintiff submitted his reply to defendant's motion to dismiss, and motion for summary judgment. In this document he prayed to the District Court to be allowed to start discovery on his class action. There was never any response on the discovery issue despite the standing order establishing pretrial procedure adopted pursuant to general order of June 26, 1985, that

pretrial conference would cover the probable length of time needed for discovery and the possibility for settlement of the case.

Plaintiff attended every status call and neither discovery or settlement was ever mentioned. The pretrial conference consisted mostly of defendant requesting an extension of time to do something. Therefore, plaintiff was surprised by District Court's sua sponte dismissal. Petitioner knew it was possible. See Hale v. Marsh, 42 FEP Cases 944, December 23, 1986.

Sua sponte dismissals are not encouraged in this Circuit as established in Doe v. St. Joseph's Hospital. 40 FEP, Cases 822, April 2, 1986, stating, inter alia:

Sua sponte dismissals without prior notice or an opportunity to be heard on the issues underlying the dismissal, however, 'generally may be consideredhazardous.' Tamari, 565 F.2d at 1198. They may be criticized on several grounds. First, they conflict with traditional adversarial concepts of justice to the extent that they make the district court 'a proponent rather than an independent entity.' Tingler v. Marshall, 716 F.2d 1109,1111 (6th Cir. 1983); see Franklin v. Oregon, 662 F.2d 1337, 1342 (9th Cir. 1981). Second, such dismissals may ultimately waste, rather than economize, judicial resources, by producing appeals and remands that might have been avoided. See Salibra v. Supreme Court of Ohio, 730 F.2d 1059,

1062 (6th Cir.), cert., denied, 105 S.Ct. 295 (1984); Tingler, 716 F.2d at 1111; Franklin, 662 F.2d at 1342; Lewis v. New York, 547 F.2d 4 (2d Cir. 1976). Third, sua sponte dismissals may prejudice plaintiffs by depriving them of an opportunity to amend their complaints or to argue against the dismissal. Tingler, 716 F.2d at 1111.

We cannot find a Seventh Circuit case in which a sua sponte dismissal without any notice and opportunity to be heard has been upheld."

It is well settled that discovery is not available in the administrative process. When district court makes sua sponte dismissals as in this instant case plaintiff is denied his right to reasonable discovery.

The Fourth Circuit addressed the discovery issue in Ardrey v. United Parcel Service, 41 FEP Cases 1654, August 18, 1986, stating inter alia: "The scope of discovery in Title VII Cases is geared to allowing plaintiffs to proceed under either disparate treatment or pattern or practice theory or both. Generally, undue restrictions of discovery in Title VII Cases are "especially frowned upon." See Trevino v. Celanese Corp., 701 F.2d 397 33 FEP Cases 1324 (5th Cir. 1983).

For the above stated reasons, plaintiff deems himself to have suffered abuse of discretion on the part of the district court.

(6) WHETHER THE DISTRICT COURT ERRED IN FAILURE TO RESOLVE THE UNTIMELINESS ISSUE.

On this issue, defendant is hoisted on his own petard. Defendant knew the timeliness issue was a sham and now they must live with it. It is something that the trier of fact does not have the authority to sweep under the rug by stating, "The court need not decide defendant's motion to dismiss the complaint as untimely and expresses no opinion on its merit."

Senior District Judge Decker resolved a far more complex timeliness issue in Flagg v. Santa Fe Ry. Co., 42 FEP Cases 1066, December 18, 1985. He did not dodge the issue at that time and it can not be ducked at this time.

It is well settled that if plaintiff did not exhaust his administrative remedies in a timely manner, the ball

game is over. Case law has established that one day can be the difference between going forward and stopping in your tracks.

The district court in Eastern District of Michigan addressed the exhaustion of administrative remedies in Del Johnson v. U.S. Postal Service, 42 FEP Cases 980, where plaintiff's appeal was filed 21 calendar days instead of the allowable 20 calendar days and was dismissed for failure to comply with 29 CFR 1613.233(a) constituting a failure to exhaust administrative remedies. See Boyd v. U.S. Postal Service, 752 F.2d 410, 414,36 FEP Cases 1417 (9th Cir. 1985).

In a letter to the District Court dated September 24, 1986, defendant

informed the trier of fact that the Seventh Circuit in Sims v. Heckler, 725 F.2d 1143, 1143,1145 (7th Cir. 1984) established the proposition that the timely filing of an EEOC charge is a jurisdictional prerequisite to federal action under Title VII. Plaintiff claims he filed in a timely manner. Defendant claims he did not. This is an issue for the court to resolve.

CONCLUSION

For the reasons stated above, this court should remand this case for a new trial which under Circuit Rule 18 would be conducted by a different judge.

IN THE UNITED STATES COURT OF APPEAL
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

MAY 4th, 1987

HENRY HALE, individually and on the behalf of the class of all others similarly situated, Plaintiffs-Appellants	)	No. 86-3085
	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
vs.	)	
WILLIAM E. BROCK, Secretary of Labor, Occupational Safety and Health Administration, Defendant-Appellee.	)	
	)	No. 85 C 6173
	)	Judge Bernard M. Decker

PLAINTIFFS-APPELLANTS' STATEMENT

AS TO NEED FOR ORAL ARGUMENT

Plaintiff-Appellant, pro se at this point in time, pursuant to Rule 34(a) Federal Rules of Appellate Procedure and

Circuit Rule 34(f) respectfully suggests that this court allow oral argument in this instant case because:

(1) the appeal is not frivolous; and

(2) the set of issues presented in this instant case have not been recently authoritatively decided; and

(3) the facts and legal arguments are not adequately presented in the briefs and the decisional process would be significantly aided by oral argument.

(4) Appellant is thoroughly familiar with the entire record at the administrative and district court levels and is able to do justice to the argument; in addition, he is prepared to become familiar with the court by listening to other arguments.

(5) Appellant relied on his attorneys

in good faith before the district court and thinks he was denied an adequate opportunity to present his case. It is too late in the day after such a long journey (October, 1978) and entirely contrary to the spirit of fairness and substantial justice for appellant to be subjected to another sua sponte ruling and not have his day in court.

WHEREFORE, Plaintiff-Appellant prays that this court decides oral argument would be helpful in deciding the above-captioned case.

Respectfully submitted,

/s/Henry H. Hale, pro se
1011 Partridge Lane
Lake Zurich, IL 60047
(312) 438-5065

LIST OF DOCUMENTS
JUDGE DECKER 85 C 6173

07/09/85	Filed 7/8/85 Complaint
07/09/85	Filed 7/8/85 Civil Cover Sheet
07/09/85	Filed 7/8/85 Appearances of Alfred L. O'Connor, Clincy M. Latimer, Jr., and Michael Heuberger as attorney for plaintiffs, with affidavit re rule 39 attached
07/15/85	Filed 7/15/85 AUSA James J. Jubik appearance-informational letter
09/17/85	ENTER ORDER DATED 9/16/85: DJudgment is entered as follow: Defendant granted extension to November 5, 1985 to answer or other wise plead.---Decker, J Mailed notices 11-15-85
12/20/85	Filed 12/19/85 Defendant's ANSWER
01/22/86	Enter order dated 1/21/86: Status hearing held. Plaintiff to file response to affirmative defenses Feb. 11, 1986. Government may answer response Feb. 21, 1986. Status hearing continued to Mar. 20, 1986 at 10 Am--Decker, SJ Mld notices 1/22/86
02/12/86	Filed 02/11/86: Plaintiff's Answer to defendant's affirmative defenses.
03/21/86	Minute Order of 03/20/86: Status hearing held. Defendant to file motion for summaryb

judgment May 20, 1986. Plaintiff to file response June 20, 1986. Defendant to file reply July 7, 1986. Ruling to be mailed notices 03/21/86

06/24/86 Filed 06/23/86: Plaintiff's Reply to Defendant's Motion to Dismiss and Motion for Summary Judgment.

07/18/86 Minute order of 07/17/86: Agreed motion for an extension of time for defendant to reply to plaintiff's response to defendant's motion to dismiss or, for summary judgment is granted to and including July 29, 1986. Decker, SJ Mailed notices 07/18/86. Filed 07/17/86: Agree Motion for Extension of Time for Defendant to Reply

07/30/86 Minute order of 07/30/86: Defendant's motion to dismiss, or in the alternative, for summary judgment is taken under advisement, with ruling by mail to be made on or before September 25, 1986. Decker, SJ Mailed notices 07/31/86.

09/08/86 Filed 09/05/86: Plaintiff's Affidavit.

10/17/86 Minute order of 10/16/86: Defendant's motion for summary judgment with respect to plaintiff's individual claims is granted. As no named representaive remains, the class action is dismissed

	without prejudice to the purported class members. The court need decide defendant's motion to dismiss the complaint as untimely and expresses no opinion of tis merit. Enter memorandum opinion. For further detail, see order attached to the original minute order form. Decker, SJ Mailed notices 10/17/86. Enter order of 10/16/86: MEMORANDUM OPINION AND ORDER. Judgment pursuant to rule 58.
12-17-86	Filed 12-15-86: Plaintiff Henry H. Hale Notice of Appeal, from order entered on 10-16-86: ($70.00 Paid). Transmitted 12-17-86: To the U.S.C.A. short record on appeal consisting of file stamped copy of Notice of Appeal, 7th Circuit Information Sheet, and a copy of docket entries and a copy of Appealed order #26 and #27. Mailed 12-17-86: To all counsel of record; copy of Notice of Appeal and Circuit Rule 4(a) letter; with copy of docket and 7th Circuit Transcripts Sheet to: Henry H. Hale.

IN THE UNITED STATES COURT OF APPEAL
FOR THE SEVENTH CIRCUIT

HENRY HALE, individually and on the behalf of the class of all others similarly situated, Plaintiffs-Appellants	)	No. 86-3085
	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
vs.	)	
WILLIAM E. BROCK, Secretary of Labor, Occupational Safety and Health Administration, Defendant-Appellee.	)	
	)	No. 85 C 6173
	)	Judge Bernard M. Decker

APPELLANT'S RESPONSE TO APPELLEE'S MOTION FOR EXTENSION OF TIME TO FILE ITS BRIEF AND SUB-SEQUENT ACTION OF THE CLERK OF THE COURT

Plaintiff-appellant, Henry H. Hale, pro se, deems himself adversely affected by the actions of named parties and pursuant to Rule 27(b) and Rule 31 of

Federal Rules of Appellate Procedure, respectfully requests consideration or modification of such action.

In support of appellant's motion of consideration, the affidavit of appellant is attached hereto.

WHEREFORE, appellant prays that appellee's extended time is reduced and appellant is given 14 days after service of the brief of the appellee to file a reply brief pursuant to Rule 31 of the Federal Rules of Appellate Procedure. In addition, appellant prays for permission to supplement his brief.

Respectfully submitted,

/s/Henry H. Hale, pro se
1011 Partridge Lane
Lake Zurich, IL 60047
(312) 438-5065

STATE OF ILLINOIS)
) S.S.
COUNTY OF COOK)

AFFIDAVIT OF HENRY H. HALE,
PLAINTIFF-APPELLANT

I, Henry H. Hale, being first duly sworn, depose and state:

1. I am the appellant in this appeal and timely filed my brief because extensions of time to file briefs are not favored according to Circuit Rule 8.

2. Yet appellee was given a 51 day extension to file his brief and I was informed that I would have only 11 days to file a reply brief instead of the 14 days granted by Rule 31(a) of the Federal Rules of Appellate Procedure.

3. Circuit Rule 8 requires notice of the fact that an extension will be sought must be given to the opposing counsel

together with a copy of the motion prior to the filing thereof. (emphasis added). The record shows that I was not given a copy of the motion prior to the filing thereof.

4. In addition, affiant's affidavit did not give a description of action taken on a request for continuance or deferment of other litigation pursuant to Circuit Rule 8(a)(1)(a).

5. Neither did the affiant's affidavit provide an explanation of the reasons why other litigation should receive priority over this instant case as presented in Circuit Rule 8(a)(1)(b).

6. Neither did the affiant's affidavit provide other relevant circumstances including why other associated local counsel could not either

prepare the brief for filing or in the alternative, relieve the movant's counsel of other litigation claimed as a ground for extension. Therefore, it would appear that only appellant is required to comply with the Rules.

7. My thoughts on this issue are expressed by Federal District Judge, D. J. Winner in EEOC v. Los Alamos Constructors. Inc., 8 EPD #9763, District of New Mexico, October 9, 1974, stating, inter alia: "...When the government or one of its agencies comes into court (with very few exceptions), it is to be treated in exactly the same way as any other litigant. Appointment to office does not confer upon a bureaucrat the right to decide the rules of the game applicable to his crusades or his

lawsuits...

The government should occupy no position, better or worse, than any other litigant, unless some special circumstances exists."

8. In addition, although Berger v. United States, (1935) 295 U.S. 78, 88, was a criminal case, what was there said as to the responsibilities of government lawyers is fully applicable to government counsel in civil cases: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligatin to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal presecution, is not that it shall win a case, but that justice shall be done."

9. I am aware that Rule 28(j) of the Federal Rules of Appellate Procedure permits me to bring to the attention of this court pertinent and significant authorities after my brief has been filed. However, argument is not allowed, and it is the argument and conclusion fo my brief that I would like permission to supplement.

10. Since this court does not encourage oral arguments in cases such as this, my brief takes on an additional importance.

11. Since appellee has been given an additional 51 days which added to the original 30 days gives appellee 81 days compared to my 40 days to file my brief. Justice and fairness should give me an opportunity to supplement my brief. I

should be given a fair amount of time to respond to appellee's response whenever it is filed.

12. These remarks are mailed at the Des Plaines Post Office, Des Plaines, Illinois, at the hour of about 4:45 pm, March 2, 1987. A copy is mailed at the same time to:

ANTON R. VALUKAS
United States Attorney
Attn: Frederick H. Branding
Assistant United States
Attorney
219 South Dearborn Street
Chicago, IL 60604.

Respectfullysubmitted,
/s/Henry H. Hale, pro se
1011 Partridge Lane
Lake Zurich, IL 60047
312/438-5065

Subscribed and sworn to
before me this 2nd day of
March, 1987.
/s/Lucille Cline
NOTARY PUBLIC

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 86-3085

HENRY H. HALE, et. al. PLAINTIFF-APPELLANT

v.

WILLIAM E. BROCK, SECRETARY OF LABOR DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Divison

No. 85 C 6173

The Honorable Bernard M. Decker, Judge Presiding

REPLY TO RESPONSE OF BRIEF FOR

DEFENDANT-APPELLEE,

WILLIAM E. BROCK,
SECRETARY OF LABOR

Henry H. Hale,pro se

Submitted: May 4, 1987

1. Appellee's response is more noteworthy from what it excludes than from what it includes; i.e., the response makes no effort to rebut appellant's charge that case law in this circuit requires (emphasis added) class certification decision prior to a determination on the merits; there was no response from appellee regarding the claim that petitioner was not given a de novo trail; and there was no response to the charge that appellant was not given a fair opportunity to develop his case through discovery.

2. On page 6, appellee states, inter alia: "Plaintiff also was not certified for the Cleveland and Cincinnati Area Director positions...." This statement ignores the fact that

appellant was indeed certified by a panel for both the Cleveland and Cincinnati Area Director positions but the certification was discriminatory cancelled.

3. In the same paragraph, appellee stated, "Regarding the Charleston, West Virginia Area Director position, the panel found that plaintiff lacked the requisite knowledge, skills, and work experience (emphasis added by the writer) necessary to receive a rating of 'highly qualified.' This panel was a few years ahead of Al Campanis but they were also saying that Blacks lack the 'necessities.' For instance, this panel claimed that appellant could not express himself in written form.

4. Regarding the "work experience",

supra, the Fifth Circuit spoke to this experience issue in Rowe v. General Motors Corp., 4 FEP Cases 452, March 2, 1972, stating, inter alia: "Akin to this is the contention that 'experience' was essential and only the long-employed Whites-and conversely, not the recently hired Blacks-had the 'experience'.... would enable an individual foreman, if he were so inclined, to exercise racial discrimination in his selection of candidates for promotion, and that, under the social structure of the times and place, Blacks may very well have been hindered in obtaining recommendations from their foremen since there is no familial or social association between the two groups... We and others have expressed a skepticism that Black persons

dependent directly on decisive recommendations from Whites can expect non-discriminatory action."

5. On page 10, appellee states, inter alia: "Simply put, plaintiff was not as qualified as the selectees, nor was he sufficiently qualified for five of the six positions for which he applied." The Supreme Court spoke to this issue in Johnson v. Transportation Agency, 43 FEP Cases 422., March 25, 1987, stating, inter alia: "It is a standard tenet of personnel administration that there is rarely a single 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection.

Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective."

6. In page 10, appellee states, inter alia: "The purported class is unmanageable within the meaning of Federal Rules of Civil Procedure 23(b)(3)." Apparently appellee is not aware that Rule 23(b)(2) governs Title VII cases.

7. Appellee on page 14 states, inter alia: "Plaintiff cannot adequately represent the purported class. He is not represented by counsel and lacks adequate

knowledge and understanding of the circumstances affecting the individual members of the class." If the case goes forward, appellant will meet the requirement of Rule 23(a)(4) by retaining counsel.

8. In the same paragraph, appellee states, inter alia: "As a class representative he is responsible for bearing the considerable financial cost of notice to other class members and there is no evidence that plaintiff can afford such costs." Such costs would be de minimis compared to the over ten thousand dollars that appellant has already spent on this case. He is a GM-14 Manager earning over fifty-two thousand dollars annually plus two thousand dollars earned delivering the

Chicago Tribune newspaper every morning.

9. On page 15, appellee raised again the red herring claim of untimeliness when it has been established that the appeal was filed on time. In this instant case, appellant filed eight (emphasis added) complaints of discrimination in a timely manner. It is logical that he would be able to file an appeal within twenty days. Appellee is saying in so many words that Blacks should not apply for the high level positions that have been traditionally closed to them. They will be forever confronted with the most common reason advanced for failing to promote them which is the alleged superior qualifications of the selected White applicant.

CONCLUSION

For the reasons appellant stated in rebuttal and the reasons stated in his previous brief, appellant prays this court will remand this case for a new trial which under Circuit Rule 36 (old Rule 18) would be conducted by a different judge.

CERTIFICATE OF SERVICE

State of Illinois)
) S.S.
County of Cook)

I certify that I have this 4th day of May, 1987, served the parties in the action with the foregoing document by hand delivering 15 copies to the Clerk of the Seventh Circuit and two copies to the opposing counsel of record at the following address:

To: Anton R. Valukas
United States Attorney
Attn: Frederick H. Branding
Assistant United States Attorney
219 South Dearborn Street
Chicago, IL 60604

/s/Henry H. Hale, pro se
Plaintiff-Appellant
1011 Partridge Lane
Lake Zurich, IL 60047
(312) 438-5065

JUDGMENT - WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 24, 1987

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

IN THE UNITED STATES COURT OF APPEAL
FOR THE SEVENTH CIRCUIT

HENRY HALE, individually and on the behalf of the class of all others similarly situated, Plaintiffs-Appellants	)	No. 86-3085
	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
vs.	)	
86-3085 WILLIAM E. BROCK, Secretary of Labor, Occupational Safety and Health Administration, Defendant-Appellee.	)	No. 85 C 6173
	)	Judge Bernard M. Decker

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in

this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted August 20, 1987*

September 24, 1987

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

HENRY HALE, individually and on the behalf of the class of all others similarly situated, Plaintiffs-Appellants	)	No. 86-3085
	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
vs.	)	
86-3085 WILLIAM E. BROCK, Secretary of Labor, Occupational Safety and Health Administration, Defendant-Appellee.	)	No. 85 C 6173
	)	Judge Bernard M. Decker

* After preliminary examination of the brief, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 34(f). Plaintiff-appellant has filed such a statement and

requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

ORDER

Appellant Henry Hale filed a Title VII claim as an individual and class action suit, alleging that the United States Department of Labor engaged in racially discriminatory hiring practices. The district court carefully evaluated Hale's claim and properly granted the defendant's motion for summary judgment before certifying the class. Footnote 1/ "The district court dismissed the class action without prejudice to the purported

class members because no named representative remained. Although this was not a ruling on the merits of the class certification, it was a ruling declining to grant class certification, and the district court entered judgment for the defendant. Hence, there is a final judgment that we have jusrisdiction to review. Cf. Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1034 n.1 (7th Cir. 1987). Additionally, since the district court never certified this case as a class action, we treat this appeal as an appeal of Hale's individual claims. Clift v. International Union, 818 F.2d 623, 626 (7th Cir. 1987)." End of 1/

See Roberts v. American Airlines, Inc., 526 F.2d 757, 762-63 (7th Cir. 1975) (defendant can move for summary judgment

before disposition of motion for class certification, but no preclusive effect of judgment on absent class members if motion granted), cert. denied, 425 U.S. 951 (1976). Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552-53 (1986) (expressing the proper standard for granting summary judgment). Accordingly, we adopt the opinion as our own. Footnote 2/ "The district court expressed no opinion about the defendant's motion to dismiss the complaint as untimely. On appeal, the defendant again urges that the district court should have dismissed the complaint because Hale failed to exhaust his administrative remedies when he filed an untimely appeal with the Office of Review and Appeals. This flaw was corrected, however, when Hale filed his first

complaint and the district court remanded the case for further administrative review. Hale's claim for relief was denied by the agency, and he then filed the present complaint. Therefore, Hale has exhausted his administrative remedies." End of footnote 2/

We pause briefly to address two issues. Hale argues that the district court erred in not allowing him more time for discovery before ruling on the summary judgment motion. Footnote 3/"Hale mistakenly refers to the district court's disposition as a "sua sponte dismissal." The court granted summary judgment, however, after the defendant moved for summary judgment, and Hale filed a response in opposition and an affidavit." End of footnote 3/ However, Hale failed to

request a continuence; therefore, it was not error for the district court to proceed in ruling on the motion for summary judgment. Vachet v. Central Newspapers, Inc., 816 F.2d 313, 317 (7th Cir. 1987). Hale also submits that the district court denied him the right to a trial by jury. "No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined." Ex parte Peterson, 253 U.S. 300, 310 (1920). By definition, summary judgment is granted where there are no genuine issues of material fact, see Fed. R.. Civ. P. 56(c), so that a party against whom summary judgment is granted is not entitled to trail by jury.

AFFIRMED

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

OCTOBER 8, 1987

HENRY HALE, individually and on the behalf of the class of all others similarly situated, Plaintiffs-Appellants	)	No. 86-3085
	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
vs.	)	
86-3085 WILLIAM E. BROCK, Secretary of Labor, Occupational Safety and Health Administration, Defendant-Appellee.	)	No. 85 C 6173
	)	Judge Bernard M. Decker

PETITION FOR REHEARING,
WITH SUGGESTION FOR REHEARING IN BANC

The panel's unpublished order of September 24, 1987, appears to be seriously at odds with previous decisions of this Court and the Supreme Court; therefore, consideration by the full Court is necessary to secure or maintain uniformity of its decisions. In addition, the order contains a glaring misstatement when it states: "Hale also submits that the district court denied him the right to a trial by jury. 'No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined.' Ex parte Peterson, 253 U.S. 300, 310 (1920). By definition, summary judgment is granted where there are no genuine issues of material fact,

see Fed. R. Civ. P. 56(c), so that a party against whom summary judgment is granted is not entitled to trial by jury."

Appellant has not requested of the district court a trial by jury because he knew it was proscribed by the Supreme Court stating, inter alia: "There is no right to trial by jury in cases arising under Title VII." See Lorillard v. Pons, 16 EPD #8134, 434 U.S. 583-584; Great American Fed. Savings & Loan Association v. Novotny, 20 EPD #30,004, 442 U.S. 366, 375, and n. 19; Lehman v. Nakshian, 26 EPD #31,900 at 21,020.

The order also states: "Hale argues that the district court erred in not allowing him more time for discovery before ruling on the summary judgment motion. However, Hale failed to request a continuance; therefore, it was not error for the district court to proceed in ruling on the motion for summary judgment. Vachet v. Central Newspapers, Inc., 816 F.2d 313, 317 (7th Cir. 1987)."

The Vachet case is not appropriate in this instant case. With a member of the panel writing, Circuit Judge Ripple, states: "Vachet claims that the grant of summary judgment was improper because he was out of the state at the time the motion was before the court, and he was unable to file his affidavit in

opposition. He argues that the district court should have applied Rule 56(f) which permits a court to grant a continuance when affidavits are unavailable. However, Vachet failed to request a continuance. Therefore, it was not error for the district court to perceive in ruling on the motion. This court has held that, if a party cannot present by affidavit facts essential to justify his opposition to a motion for summary judgment, he should move for a continuance to obtain discovery under rule 56(f). Federal Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir.)."

In addition, in Vachet the plaintiff had been arrested for haboring a fugitive; whereas, in this instant case, the plaintiff is Congress' chosen instrument

to vindicate "A policy that Congress considered of the highest priority with the plaintiff serving in the role of 'a private attorney general.'" See Newman v. Piggie Park Enterprises, 2 EPD #9834, 390 U.S. 400,402.

Also, it would have been necessary for appellant to have read the mind of the trier of facts for him to have requested a continuance. The district court did not at any time in this instant case direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The district court didnot issue a scheduling order setting the discovery cutoff date. How was appellant to know when to request a continuance without being a clairvoyant person? Isn't the district court governed by Rule 26(f)

of the Federal Rules of Civil Procedure? Exhibit A on page A-1 is a log of the district court and is totally void of any reference to a discovery conference (emphasis added).

The Ninth Circuit spoke to the issue of whether summary judgment was properly granted without the trial court first ruling on the merits of plaintiff's discovery motion in Garrett v. city & County of San Francisco, 44 FEP Cases 865, 867, stating, inter alia: "First, although not formally denominated as a request under Rule 56(f), under Ninth Circuit precedent Garrett's discovery motion was sufficient to raise the issue of whether he should be permitted additional discovery. Hancock v. Montgomery Ward Long Term Disability

Trust, 787 F.2d at 1306 n. 1 (pending motion to compel discovery was sufficient to raise Rule 56(f) consideration); see also, Program Eng'g, Inc. v. Triangle Publications, Inc., 634 F.2d 1188, 1193 (9th Cir. 1980)(motion to strike portions of summary judgment motion was sufficient to raise Rule 56(f) consideration).

In denying the discovery motion as "moot" after having first granted defendants' summary judgment motion, the district court failed to exercise its discretion with respect to the discovery motion. See Patty precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264-65 (10th Cir. 1984)(trial court's failure to rule on opposing party's Rule 56(f) affidavit prior to granting summary judgment against it reversed as a failure

to exercise discretion); Sames v. Gable, 732 F.2d 49, 52 (3rd Cir. 1984)(error to grant motion for summary judgment while pertinent discovery requests were outstanding); Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 (2d Cir. 1983)(summary judgment should not be granted while opposing party timely seeks discovery of potentially favorable information)....

Thus, this case presents the circumstance where 'a party's access to...material is of cricial importance...where the information is likely to be in the sole possession of the opposing party.' Patty Precision, 742 F.2d at 1264.

It was error for the trial court to have granted defendants' motion for

summary judgment without first having determined the merits of plaintiff's pending discovery motion."

In Celotex Corp. v. Catrett, 106 S.Ct. 2548, the Supreme Court, Justice Rehnquist, held that: "(1) Rule 56(c) mandates the entry of summary judgment after adequate time for discovery (emphasis added by the writer) against a party who fails to make a showing sufficient to establish the existence to an element essential to the party's case as to which that party will bear the burden of proof at trial; (2) there is no requirement that moving party support its motion with affidavits or other similar materials negating the opponent's claim; and (3) nonmoving party need not produce evidence in a form that would be

admissible in a trial in order to avoid summary judgment."

The question is what did Justice Rehnquist mean by "adequate time for discovery?" Reasonable people can disagree on what adequate time for discovery is. However, no one would say zero time is adequate and this lack of discrettion on the part of the district court regarding the lack of discovery is reversible.

SUMMARY JUDGMENT

Appellant agrees with the panel that Supreme Court expresses the proper standard for granting summary judgment in Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2554, 2555, stating, inter alia: "The parties had conducted discovery, and

no serious claim can be made that respondent was in any sense 'railroaded' by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery."

Since in this instant case the parties had not (emphasis added) conducted discovery, a claim can be made that appellant was in a sense "railroaded" by a premature motion for summary judgment.

In addition, Rule 56.27 states, inter alia: "For purposes of ruling on the motion all factual inferences are to be taken against the moving party in favor of

the opposing party, and a case is not suitable for summary judgment when there are undisputed facts from which different inferences might be drawn and as to which reasonable minds might differ. Sankovich v. Life ins. Co. of North America, (CA 9th, 1981) 638 F.2d 136d. 56.15(1), (3). An appellate court will do likewise in reviewing the trial court's grant of summary judgment. 56.27(1)."

Appellant has maintained in his brief and continued to maintain that the timeliness issue was a genuine issue in dispute and proscibed summary judgment dispite the panel's efforts to resolve the issue in footnote 2.

The Third Circuit in in re Japanese Electronic Products AntiTrust Litigation, 723 F.2d at 258, states: "If there is any

evidence in the record from any source from which a reasonable inference in the nonmoving party's favor may be drawn, the moving party simply cannot obtain a summary judgment."

The district court based its decision to grant summary judgment in this instant case on the results of administrative proceedings entirely, and that is proscribed by Chandler v. Roudebush, 12 FEP Cases 1368, U.S. S.Ct., June 1, 1976, stating, inter alia: "Since the Court of Appeals in this case erroneously concluded that #717(c) does not accord a federal employee the same right to a trial de novo as private sector employees enjoy under Title VII, its judgment must be reversed and the case remanded for further proceedings consistent with this opinion."

From the decision in Chandler a reasonable person would think that appellant would see the inside of a courtroom, but it has been a paper chase all the way both at the district court level and the appellate level. This certainly reduces overcrowed dockets; but is it justice to substitute a live trial for paper pushing exercises when there are genuine issues of material facts to be tried?

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 20th, 1987

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

IN THE UNITED STATES COURT OF APPEAL
FOR THE SEVENTH CIRCUIT

HENRY HALE, individually and on the behalf of the class of all others similarly situated, Plaintiffs-Appellants	)	No. 86-3085
	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
vs.	)	
WILLIAM E. BROCK, Secretary of Labor, Occupational Safety and Health Administration, Defendant-Appellee.	)	No. 85 C 6173
	)	Judge Bernard M. Decker

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by pro se appellant on Octoberr 8, 1987, no judge in active service has requested a vote thereon, and all judges on the

original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.